Supreme Court, U.S.
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No. 03-

IN THE
Supreme Court of the United States

ZACHARY TAYLOR, AS EXECUTOR OF THE ESTATE OF JACK T. TAYLOR, JR., AND THE TAYLOR FAMILY PARTNERSHIP,
Petitioners,

v.

EUGENE LOBATO, EMILIO LOBATO JR., MICHAEL J. VIGIL, NORMAN MAESTAS, EUGENE MARTINEZ, CORPUS GALLEGOS BY AND THROUGH HIS CONSERVATOR YVETTE GALLEGOS, AND ZACK BERNAL,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State's compliance with due process in quieting title is determined by the reasonableness of its statutory notice requirements, as this Court has repeatedly held, and not by whether a private litigant was sufficiently diligent in identifying possible claimants or their predecessors in interest.

2. Whether the law of the former sovereign nation applies to determine private property rights in a United States territory, absent any affirmative alteration of that law by Congress or the territorial authority.

3. Whether a confirmation of absolute title under the Act of Confirmation of 1860, and a subsequent United States land patent issued thereupon, are conclusive against parties asserting prior rights in the property.

STATEMENT OF PARTIES

Petitioners Zachary Taylor and the Taylor Family Partnership are parties of record below. During the course of this litigation, the property at issue was conveyed to Western Properties Investors, LLC, and Jaroso Creek Ranch, LLC, which are the real parties in interest.

In addition to the parties named in the caption, the following were plaintiffs, appellants, and petitioners below:

> Gabrielita Adeline Espinosa; Edward Espinosa; Pete E. Espinosa, Jr.; Gloria Gallegos; Rupert Gallegos; Raymond Garcia; Charlie Jacquez, Jr.; Adolph J. Lobato; Bonifacio "Bonnie" Lobato, By And Through His Conservator Teresa Lobato; Carlos Lobato; Jose F. Lobato; Presesentacion J. Lobato; Gloria Maestas; Robert "Bobby" Maestas; Raymond J. Maestas; Mark Martinez; Agatha Medina; Gilbert "Andres" Montoya; Shirley Romero Otero; Eppie Quintana; Lucille Samelko; Arnold Valdez; Ervin L. Vigil; Larry J. Vigil; Billy Alire; Robert Atencio; Frances D. Berggran-Buhrles; Jose Fred Carson; Elmer Manuel Espinosa; Margurito Espinosa; Moises Gallegos; Ruben Gallegos; Richard J. Garcia; Manuel Gardunio; Ruben Herrara; Jeffrey Jacquez; Adelmo Kaber; Crucito Maes; Daniel Martinez; David Martinez; Jesse Martinez; Leonardo Martinez; Rosendo Martinez; Solestiano Martinez; Alfonso Medina; Gilbert Medina; Leandardo Medina; Loyola Medina; Marvin Medina; Orry Medina; Raymond N. Medina; Rudy Montoya; Gurtrude C. Olivas; Eppy Wayne Quintana; Robert Romero; Shirley Romero; Anthony Sanchez; Bonnie Sanchez; Eugene Sanchez; Evan Sanchez; James Sanchez; Jose G. Sanchez; Rufino Sanchez; S.R. Sanchez; Vernon Sanchez; Ronald A. Sandoval; Elesam Santistevan; Daniel Segura; Floyd R. Solan; Carolyn Taylor; Sam

Valdez; Martha Vialpondo; Joe P. Vigil; and Walter Vigil.

In addition to the parties named in the caption, the following were defendants, appellees, and respondents below:

J. Hoy Anderson; Marvin Lavern Stohs; Edythe Kelly Stohs; Charles W. Gelderman; William F. Phinney; Harlan A. Brown; Dena F. Fuhrmann; Jimmy C. Crook; Freeland D. Crumley; Joseph P. Campisi; Hugh R. Denton; Robert Paul Resteli; Eugene J. Kafka; Avis M. Anderson; Clifford R. Jenson; Don W. Jacobs; Raymond E. Gauthier; Francis P. Hester; and Howard G. Frailey.

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PETITION FOR A WRIT OF CERTIORARI

Zachary Taylor and the Taylor Family Partnership ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The Colorado Supreme Court has issued three *en banc* opinions in this case. Its first opinion is *Rael* v. *Taylor*, 876 P.2d 1210 (Colo. 1994), which is reproduced at Petition Appendix (App.) 120a-172a. Its second opinion is *Lobato* v. *Taylor*, 71 P.3d 938 (Colo. 2002) ("*Lobato I*"), which is reproduced at App. 49a-119a. Its third opinion is *Lobato* v. *Taylor*, 70 P.3d 1152 (Colo. 2003) ("*Lobato II*"), which is reproduced at App. 1a-48a.

The relevant opinions of the Colorado Court of Appeals below are reported at 13 P.3d 821 (2000) and 832 P.2d 1011 (1991). They are reproduced at App. 173a-206a. The opinions of the District Court, Costilla County, Colorado, are unpublished, and are reproduced at App. 207a-236a.

STATEMENT OF JURISDICTION

The judgment of the Colorado Supreme Court was entered on April 28, 2003. The Colorado Supreme Court modified its opinion and denied a petition for rehearing on June 16, 2003. App. 237a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. See *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469 (1975).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The federal statutes at issue in this case are the Act of July 22, 1854, ch. 103, 10 Stat. 308, and the Act of Confirmation, ch. 167, 12 Stat. 71 (1860), which are reproduced at App. 247a-252a and App. 252a-254a respectively. The state statute

at issue is Colorado's Torrens Title Registration Act ("Torrens Act"), Colo. Rev. Stat. § 38-36-101, *et seq.*, which is reproduced in relevant part at App. 255a-268a. The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment, which provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The litigation in this case makes the proceedings described in Bleak House look like the "rocket docket" employed in the United States District Court for the Eastern District of Virginia. Efforts to determine finally that petitioners are entitled to the uninterrupted enjoyment of property rights that they and their predecessors in interest have maintained since before the property was part of the United States have now been in litigation for more than 125 years. Seemingly conclusive opinions by the United States Court of Appeals for the Tenth Circuit and this Court have not succeeded so far in bringing this endless dispute to a close. But at bottom the various holdings of the Colorado Supreme Court raise critical issues concerning the requirement of notice under the Due Process Clause and the law governing property interests throughout the West that warrant this Court's attention.

Over 125 years ago, this Court upheld the congressional confirmation of absolute title to the property in this case in petitioners' predecessor-in-interest. *Tameling* v. *United States Freehold & Emigration Co.*, 93 U.S. 644 (1876). Over 40 years ago, a "Torrens Act" proceeding was brought in federal district court in Colorado to quiet title in the property against claims of persons known and unknown. The district court granted the decree in 1965, and in 1967 the Tenth Circuit affirmed on the basis of *Tameling*, rejecting the claims of other county landowners that they held "*profits à prendre*"

rights in the property. *Sanchez* v. *Taylor*, 377 F.2d 733 (10th Cir. 1967).[1]

In 1981, county landowners filed suit in state court seeking the very same rights. Notwithstanding the prior federal court decisions, a deeply divided Colorado Supreme Court has now issued a trilogy of en banc decisions recognizing such rights. The decisions below are rife with error, conflict with decisions of this Court and other courts, and undermine security of title to land. First, the Colorado Supreme Court remarkably held that the 1965 federal court quiet-title decree was not *res judicata* as to certain plaintiffs. In so holding, it announced the novel rule that the Due Process Clause requires not only that the notice required by the State be "reasonably calculated ... to apprise interested parties of the pendency of the action," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), but also that the private litigant applying to quiet title exercise due diligence in conformity with "a reasonably prudent applicant" standard. This ruling conflicts not only with *Mullane*, but even more directly with *American Land Co.* v. *Zeiss*, 219 U.S. 47, 66 (1911), and decisions of other state supreme courts, which hold that if statutory notice requirements for quieting title are just and reasonable, compliance with the statute satisfies due process. The state court compounded its error by permitting respondents to assert the due process rights of prior landowners, again in conflict with multiple precedents of federal courts of appeals and state supreme courts. Second, the Colorado Supreme Court purported to recognize implied property rights acquired "under United States law" by Mexican settlers during Colorado's territorial period, App. 58a-59a, in contravention of the longstanding rule of this Court that the private property law of the former sovereign continues to apply in territory acquired by the United States, unless altered or abolished. *American Ins. Co.* v. *356 Bales of*

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[1] *Profits à prendre* are rights to enter the land in order to take something from the land. *Black's Law Dictionary* 1211 (6th ed. 1990).

Cotton, 26 U.S. (1 Pet.) 511 (1828); *Vilas* v. *City of Manila*, 220 U.S. 345, 357 (1911). Third, the state court recognized such implied rights notwithstanding congressional confirmation of title in 1860 in the landholder. This holding places the Colorado Supreme Court in direct conflict with *Tameling*, *Sanchez*, and a host of other decisions. Given the overriding importance of security of title in real property, and the broad implications of the decisions below for land rights, this Court should grant review.

A. Background.

1. Private Property Rights In Territory Acquired from Mexico.

The Mexican-American War ended with the execution of the Treaty of Guadalupe Hidalgo in 1848. By this Treaty, the United States acquired not only Texas, over which the war had been waged, but also the territories of California and New Mexico (which included parts of what is now the state of Colorado). App. 51a. The treaty required that the United States respect the private property rights of Mexicans in the acquired territories. App. 238a.

Under both international law and treaty obligation, the United States acquired the lands "subject to all the equitable rights of private property therein which existed at the time of the transfer." *Newhall* v. *Sanger*, 92 U.S. 761, 764 (1875). "[I]ndividual rights of property, in the territory acquired by the United States from Mexico, were not affected by the change of sovereignty and jurisdiction." *Tameling*, 93 U.S. at 661. Although private property rights arising from Mexican grants were to be preserved, "[t]he duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed, was within the appropriate province of the political department of the government." *Id.*

Mexican land grants had often been made in a "loose and indefinite manner," and "[w]hen the grant was made, no surveyor sighted a compass or stretched a chain." *Rodriguez*

v. *United States*, 68 U.S. (1 Wall.) 582, 587 (1863). With the California Gold Rush of 1849, it became imperative to resolve private property claims quickly. *Newhall*, 92 U.S. at 763. In 1851, Congress passed an "Act to ... settle private Land Claims" in California by decision of boards of land commissioners, subject to judicial review, Act of Mar. 3, 1851, ch. 41, 9 Stat. 631, 631, but "Congress legislated otherwise for the adjustment of land-claims in New Mexico." *Tameling*, 93 U.S. at 662. By the Act of July 22, 1854, ch. 103, 10 Stat. 308, "the duty of ascertaining their origin, nature, character, and extent was expressly enjoined upon the surveyor-general of that Territory," who "was empowered for that purpose to issue notices, summon witnesses, administer oaths, and perform all necessary acts in the premises." *Tameling*, 93 U.S. at 662. "The final action on each claim [was] reserved to Congress," *id.*, and Congress acted to confirm the titles recommended by the surveyor-general in the Act of Confirmation, ch. 167, 12 Stat. 71 (1860).

The purpose of these Acts was "to give repose to titles," resolving "[e]very question which could arise on the title claimed." *Thompson* v. *Los Angeles Farming & Milling Co.*, 180 U.S. 72, 77 (1901). Both the 1851 and 1860 Acts provided that the confirmation of title under their procedures were "quitclaims" by the United States that did not affect the rights of individual third parties. But in numerous decisions, this Court has held that the federal confirmation of title in an individual is conclusive against not only the United States but also third-party claimants. The statutory preservation of rights of third parties "'does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.'" *Barker* v. *Harvey*, 181 U.S. 481, 491 (1901) (quoting *Beard* v. *Federy*, 70 U.S. (3 Wall.) 478, 492 (1865)); *Russell* v. *Maxwell Land Grant Co.*, 158 U.S. 253, 257-58 (1895).

2. The Sangre de Cristo Grant Confirmed By Congress And Upheld In *Tameling*.

In 1844, while the New Mexico territory was still part of Mexico, Narcisco Beaubien and Stephen Luis Lee received a land grant (the Sangre de Cristo grant) from the Mexican territorial governor. The grant spanned nearly one million acres of land, mostly in south central Colorado, and encompassed the property at issue in this case. It conveyed to the grantees "'the personal and perfect possession which they solicit, serving as a title for them, their children and successors.'" *Tameling*, 93 U.S. at 649. The grantees were killed in 1847. Charles Beaubien, Narcisco's father, inherited his son's half-share in the property and purchased Lee's half-share from his estate. App. 122a.

After the United States had acquired the New Mexico territory, Charles Beaubien submitted his claim of title to the Sangre de Cristo lands to the New Mexico surveyor-general, pursuant to the 1854 Act. In 1856, following a trial, the surveyor general concluded that the Sangre de Cristo grant was "'a positive one, without any subsequent conditions attached,'" and was "'good and valid,'" and therefore "'a legal title vests in Charles Beaubien to the land.'" *Tameling*, 93 U.S. at 659. The surveyor general recommended that the grant be confirmed by Congress. *Id.* In 1860, Congress confirmed title in Beaubien to the entire Sangre de Cristo grant as a private land claim, as the surveyor-general had recommended. Act of Confirmation, ch. 167, 12 Stat. at 71; *Tameling*, 93 U.S. at 660.

After congressional confirmation of title in Beaubien, the validity of his title was raised before a Colorado territorial court and on review in this Court. In *Tameling*, this Court upheld the confirmation, ruling that it had no power "to sit in judgment upon either the recital of matters of fact by the surveyor-general, or his decision declaring the validity of the grant." 93 U.S. at 662. This Court noted that because the confirmation of title by Congress was "absolute and

unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract." *Id.* at 663. Congress's act of confirmation was "conclusive" against the third-party claim, for it "passe[d] the title of the United States as effectually as if it contained in terms a grant *de novo*, and ... a grant may be made by a law as well as by a patent pursuant to law." *Id.* The United States issued Beaubien a patent for the confirmed land in 1880. App. 122a.

B. The 1965 Torrens Decree Quieting Title In Petitioners' Predecessor In Interest.

1. The Colorado Torrens Act.

Colorado, like a number of other states, has adopted the Torrens Act to escape the manifold problems associated with traditional title recording systems. Under a recording system, the searcher may review all recorded interests in the property in question and "gamble on that basis as to the certainty of his title." App. 40a (Kourlis, J., dissenting). In contrast, the Torrens system – named after Sir Robert Torrens, who invented the system in 1858 – is "designed to convey absolute certainty of title." *Id.* at 41a.

The Torrens Act creates a system of voluntary registration of property, and permits the applicant to petition a court to enter a binding decree of registration and issue a certificate of title. App. 255a, 257a, 259a. The Torrens Act prescribes the content of the application, and requires that it be verified under oath by the applicant and accompanied by an abstract of title. The sworn application must, among other things, state "[t]he names of all persons or parties who appear of record to have any title, claim, estate, lien, or interest in the lands," as well as the names and addresses of persons other than the applicant who occupy the land, have a lien or encumbrance upon the land, or are known by the applicant to have "any estate or claims any interest in the land, in law or equity." *Id.* at 256a; App. 138a. "When the place of residence of any person whose residence is required to be given is

unknown, it may be so stated if the applicant also states that upon diligent inquiry he has been unable to ascertain the same." App. 256a.

"Immediately after the filing of the abstract of title, the court is required to appoint an examiner of titles." App. 139a. The title examiner "shall proceed to examine into the title and into the truth of the matters set forth in the application," and "shall search the records and investigate all the facts brought to his notice, and file in the case a report thereon, including a certificate of his opinion upon the title." App. 260a. The court then issues a summons naming as defendants all persons named in the application or in the title examiner's report, and "[a]ll other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application." *Id.* at 260a-261a (internal quotation marks omitted). The Torrens Act requires that residents be served as in other civil actions, and that nonresidents and unknown persons be served by publication in a county newspaper once per week for three weeks. *Id.* at 261a-262a. The clerk of the court also mails the publication notice to any nonresident defendant whose name is known. Finally, the court may direct additional service to be made. *Id.* at 262a.

When a court enters a decree of registration, that decree binds the land and quiets the title thereto, and is "forever binding and conclusive upon all persons." App. 264a. The registration decree may not be attacked unless the claimant was not actually served with process and did not have actual notice of the filing. Such individual must petition to reopen the registration within 90 days of its entry and before an innocent purchaser for value has acquired an interest. *Id.* at 264a-265a. All complaints thereafter against the decree must be pursued as actions in tort or indemnity. *Id.* The Torrens Act thus provides security of title for the registrant and subsequent purchasers, unless the owner formally removes the land from registration. App. 41a (Kourlis, J., dissenting).

2. 1960's Taylor Ranch Torrens Proceedings.

In 1960, Jack Taylor purchased a 77,000-acre tract of mountainous land within the Sangre de Cristo grant (the "Mountain Tract"). That same year, Taylor, a citizen of North Carolina, filed a diversity action in federal district court in Colorado petitioning to register title in his land as provided under the Torrens Act.

In his application, Taylor named and served as defendants not only the 47 persons appearing in the abstract of title, but also an additional 269 defendants whom he anticipated could have sought to assert a claim against his property, App. 127a; one of his attorneys stated in deposition that Taylor "'attempted to name everybody who had ever asserted any claim to any of these rights on the Taylor land.'" *Id.* at 127a n.7. Pursuant to statute, the court appointed a title examiner to determine which other persons might hold an interest in the property and require notice. The district court required personal service upon 142 additional defendants identified by the examiner, who testified "that the compilation of named defendants were the only individuals who had a possible interest in the property as landowners of Costilla County." App. 31a (Kourlis, J., dissenting). In making this determination, the title examiner had (among other things) asked the principal attorney for the landowners and a leading representative of the landowner's civic association for the names of other landowners who may have claims in the Taylor Ranch, but they were unable to identify any. App. 126a-127a. Finally, Taylor went beyond the statutory minimum notice requirements by "fenc[ing] in the property to give actual notice to any parties attempting to use the property, and publish[ing] notice in the county newspaper for six weeks." App. 47a (Kourlis, J., dissenting).

In 1964, the federal district court entered a default judgment against 369 of the defendants, and later entered judgment on the merits against the other named defendants. The court rejected their claims to rights of pasturage, wood,

timber and recreation on the Mountain Tract that purportedly derived from (1) grants to the original settlers of their property under Mexican law; (2) a grant or dedication by Charles Beaubien to settlers in 1863 shortly before his death (the "Beaubien document"); and (3) individual or common prescriptive use. App. 128a-129a.

In 1965, the district court entered a "Final Decree of Confirmation of Title and Registration." Resp. Br., Exh. C, No. 00SC527 (Colo. 1965). The court held in the Final Decree "[t]hat the statutory requirements of service, publication, and notice have been met and fulfilled," and that "title in fee simple" in the Mountain Tract is vested in Taylor "free and clear of any and all liens, encumbrances, interests, claims and estates of all persons, known and unknown," except as therein noted. *Id.* at 2, 3; App. 129a.

On appeal, the Tenth Circuit affirmed. Citing this Court's precedent "that the confirmatory Act of Congress is final and conclusive," the Tenth Circuit held that "[a]ny conflicting rights prior to the confirmatory Act of 1860 which might have arisen or existed by reason of the original grant from Mexico, considered in the light of Mexican law and the Treaty of Guadalupe-Hidalgo, were thereby extinguished." *Sanchez*, 377 F.2d at 737. The Tenth Circuit further held that the Beaubien document conveyed no rights in the Mountain Tract; that the public cannot acquire *profits à prendre* in another's land by common prescription; and that claims of individual prescriptive rights did not meet the tests of adverse possession. *Id.* at 737-39. Taylor's absolute title in the Mountain Tract thus became final against the world.

In 1973, Taylor acquired a 2,400-acre parcel known as the Salazar Estate, the title to which had been quieted by its previous owners in a state court proceeding in 1960. The Mountain Tract and Salazar Estate together constitute the Taylor Ranch, which is the property at issue in this proceeding.

C. Proceedings Below.

In 1981, over 20 years after Taylor commenced his Torrens action, and 15 years after title to the Taylor Ranch had been quieted, respondents filed this action in state court in Costilla County, Colorado. They alleged, as appurtenant to the land they owned in the county, "*profits à prendre*" rights in the Taylor Ranch to pasture, to fish, to hunt, to take wood and to recreate. App. 130a-131a. The trial court granted judgment to petitioners, and the state court of appeals affirmed on the basis of *res judicata*, citing *Sanchez*. App. 201a-206a.

In *Rael* v. *Taylor*, the state supreme court vacated the judgment by a vote of 4-3. App. 120a-172a. It faulted the court of appeals for failing to consider respondents' "argument that publication notice was constitutionally inadequate and the 1960 Torrens action decree is therefore void as to their predecessors in interest and as to them." *Id.* at 135a. The supreme court concluded that if "the petitioners prevail on this issue, the doctrine of res judicata cannot bar their claims because neither they nor their predecessors in interest can be deemed parties to the 1960 Torrens action." *Id.* The state supreme court interpreted this Court's decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), as having "established a dual standard for evaluating the adequacy of publication notice: whether under all the circumstances the means selected was reasonably calculated to reach interested parties *and whether the party giving notice* had exercised due diligence to ascertain the identities of interested parties." App. 149a (emphasis added). The court of appeals remanded for further proceedings regarding Taylor's conduct under the second prong of that standard. *Id.* at 156a.

Three justices dissented because "[t]he notice required by statute, found by the federal district court to have been 'met and fulfilled,' and affirmed by the Tenth Circuit, satisfied the requirements of due process," and thus the 1965 federal court decree was *res judicata* as to all landowners. App. 159a

(Vollack, J., dissenting). The dissent disputed that a Torrens plaintiff had any legal duty "to exercise 'reasonable diligence' to ascertain the identities of otherwise 'unknown' claimants, that is, claimants whose names or interests do not appear in the record chain of title and who are not in possession of the land," *id.* at 163a, and disputed the majority's interpretation of *Mullane*. The dissent pointed out that "*Mullane* does not require that the best means of giving notice be employed, only the most reasonable." *Id.* at 167a. Indeed, in *Mullane*, this Court had specifically held that "'"[t]he criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."'" *Id.* at 168a n.6 (quoting *Mullane*, 339 U.S. at 314-15 (quoting *Zeiss*, 219 U.S. at 67)).

On remand, the trial court bifurcated the proceedings, and held a bench trial on the *res judicata* and due process issues in September 1997. The court dismissed the vast majority of plaintiffs, but found that, for seven of the plaintiffs (the named respondents here), either they or their predecessors-in-interest were not properly served in the Torrens action, and therefore were not barred under *Rael* from pursuing their claims. App. 177a. Because no notice had been given, the court held that their current claims were not time-barred. App. 217a-218a. In the merits phase, the trial court granted summary judgment to petitioners as to claims arising under Mexican law, and judgment to petitioners after trial on the remainder of the claims. App. 177a.

The Colorado state appellate court affirmed. First, the court rejected respondents' claim that they had settlement or communal rights under Mexican law. The court noted that "the relevant documents themselves contain no references to property rights of anyone other than Narcisco Beaubien, Stephen Luis Lee, and their heirs and successors in title," and that the language of the Mexican grants was "inconsistent with an intent to grant enforceable property rights to other

parties." App. 182a. Furthermore, "even if the surveyor general and the 1860 Congress failed to recognize rights which the settlers on the Sangre de Cristo grant might have had under Mexican law, any right to enforce these in the courts no longer exists." *Id.* at 183a. The court agreed with this Court's decision in *Tameling* and the Tenth Circuit's decision in *Sanchez* that the 1860 Act of Confirmation "extinguish[ed] claims of private parties, not simply claims of the United States." *Id.* at 184a. The court next rejected any claim based on the 1863 "Beaubien document." It held that the Beaubien document neither met the formal requirements of Colorado law at the time for real property conveyances, nor did it grant rights by implication. *Id.* at 187a-193a. Finally, the court of appeals rejected the third set of respondents' claims of rights acquired since the late 19th century by prescription, ruling that *profits à prendre* cannot be acquired by prescription and that respondents had not demonstrated the requisite adversity to the landowner. *Id.* at 193a-197a.

In *Lobato I*, a divided Colorado Supreme Court reversed. The supreme court agreed with the court of appeals "that the landowners cannot claim rights under Mexican law." App. 58a. According to the court, this was because "[t]heir predecessors in title did not settle on the Sangre de Cristo grant until after the land was ceded to the United States, and thus their use rights developed under United States law." *Id.* at 58a-59a (footnote omitted). It agreed with the court of appeals that the 1863 Beaubien document was not itself a valid conveyance under territorial law, but held that it memorialized common law rights to pasturage, timber and firewood that the original settlers acquired by "prescriptive easement, an easement by estoppel, and an easement from prior use." *Id.* at 61a. It so held even though the Beaubien document addressed an entirely separate tract of land within the Sangre de Cristo grant. *Sanchez*, 377 F.2d at 737-38. Two justices dissented, declaring that the majority's analysis

was contrary to state statutory and common law and was indeed unprecedented. App. 99a-104a (Kourlis, J., dissenting). The dissent faulted the majority for abandoning the prior rule that *profits à prendre* must be expressly granted, and adopting a rule of non-hostile adverse possession that is contrary to prior Colorado law, did not appear until the *Restatement (Third) of Property: Servitudes* (1998), and has never been applied to *profits*. The dissent also criticized the majority's novel recognition of easements by estoppel without the requisite showing of a false representation or concealment of material facts by Beaubien, and of easements from prior use without the requisite showing that Beaubien had previously used the property he granted to the settlers for those purposes. App. 114a-119a (Kourlis, J., dissenting).

Having found that easements appurtenant to the land had arisen under the common law at the time of settlement, the Colorado supreme court ordered the parties to brief the due process issues not decided by the court of appeals.[2] In *Lobato II*, the supreme court began by reiterating its holding that landowners must derive their title from the original settlers, for "it was the unique circumstances surrounding Beaubien's Mexican land grant and his promises to the original settlers which gave rise to the implied easements providing the settlers' successors with their rights of access." App. 9a. The court held that landowners were entitled to *profits à prendre* if they could "establish that their predecessors in title *settled*

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[2] The supreme court inexplicably refused even to address petitioners' alternative arguments that respondents' title claims were time-barred, App. 82a, even though the dissenting justices specifically so found, App. 46a-47a, 170a. *See* App. 264a-266a (statute limiting challenges to title to 90 days after entry of a Torrens decree, leaving a claimant to a damages remedy thereafter); App. 267a (statute providing that "[n]o action shall be commenced or maintained against a person in possession of real property to question or attack the validity of or to set aside[] [the decree] *upon any ground or for any reason whatsoever*," including "want of service" or "defective service," except "in a suit commenced within said seven-year period and not thereafter") (emphasis added).

their lands at the time of the Beaubien document's creation." *Id.* at 10a-11a & n.6. That test could be met by evidence that their land had been settled during the time in which Beaubien's successor (William Gilpin) owned the Sangre de Cristo lands. *Id.* at 10a-11a.

Turning to the due process issue, the court reaffirmed the dual-standard due process test invented in *Rael*. App. 15a. Applying the second prong of that test – namely "'whether the party giving notice had exercised due diligence to ascertain the identities of interested parties'" – the court invoked its objective "reasonably prudent applicant" standard to determine if Jack Taylor had violated the landowner's Fourteenth Amendment rights. *Id.* The state court held first that all Costilla County landowners had an "identifiable interest" because the Beaubien document (although it did not address the Taylor Ranch tract) and other materials put Jack Taylor on notice that "landowners in Costilla County *might credibly claim* access rights to the Taylor Ranch," or "*might have an interest* in the Taylor Ranch." *Id.* at 18a (emphases added). Thus, the supreme court held that notice is constitutionally required not only for ascertainable persons who have a recorded interest in property or open possession of the interest, or even who have actually claimed an interest, but also for anyone whom the Torrens plaintiff has reason to believe has "potential claims" on the property. *Id.* at 19a; see *id.* at 21a (Taylor was obliged to ascertain anyone he "knew or should have known" had a claim on the land). Having determined that *all* county landowners had potential claims, the supreme court then held that their names were "reasonably ascertainable" because the tax rolls listed county property owners. It concluded that "Taylor's actions were not sufficiently diligent to comply with due process," for "a reasonably diligent applicant would have personally served all landowners in Costilla County whose names and addresses were available in the county's tax records." *Id.* at 25a. Thus, "those 1960s landowners not personally named and served in

the 1960s Torrens action, or their successors, are not barred from bringing their present claims." *Id.* at 29a.[3]

On the due process issue, Justices Kourlis and Rice dissented because "reasonable diligence does not require a landowner to serve all the parties in a county in case they might at some point have acquired rights by prescription or implication, and because ... this decision defeats the purpose of the Torrens Act by rendering Torrens decrees inconclusive." App. 37a-38a. The dissent found no due process violation, especially given that Taylor and the court-appointed title examiner went beyond the necessary statutory procedures for ascertaining parties requiring direct notice. *Id.* at 47a. The dissent criticized the majority's accession to respondents' arguments as "truly a departure from settled principles of property law, finality of judgment, and certainty of title." *Id.* at 48a.

This case is a final judgment under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). The Colorado Supreme Court ordered the case "returned to the court of appeals for remand to the trial court," and ordered petitioners to pay the costs of notifying other county landowners of potential access rights. It further "direct[ed] the trial court to identify all landowners who have access rights to the Taylor Ranch and to enter all necessary and appropriate orders to safeguard these rights." App. 30a. However, the supreme court finally held that because the trial court "specifically found that the seven plaintiffs could trace their titles to the time of Gilpin's ownership of the Taylor Ranch[,] .... these individuals need

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[3] Remarkably, even though this case was never certified as a class action and petitioners are *defendants*, the state supreme court ordered petitioners to pay the substantial expense of notice to a large number of other county landowners who are not parties – *i.e.*, to pay to invite new plaintiffs to sue them. The court purported to justify these future expenditures as court "costs," App 30a (citing Colo. R. Civ. P. 54(d)), even though such costs have always been limited to the "expenditures already made by a prevailing party." App. 47a (Kourlis, J., dissenting).

not prove their claims to the Taylor Ranch." *Id.* at 10a n.5. Because those seven plaintiffs (the named respondents here) need not submit additional factual proof to demonstrate the existence of access rights appurtenant to their land, this case is squarely within the second *Cox* category of cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480; *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 127 (1945) (judgment on transfer of property rights final despite remand for an accounting); *Asarco, Inc.* v. *Kadish*, 490 U.S. 605, 612 (1989); *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963). Regardless of whether other landowners will join the suit, the state court has finally awarded the seven respondents access rights in petitioners' property; petitioners challenge that award as patently in violation of federal law; and the federal issue will not be affected by the remand proceedings. The judgment is thus final under *Cox* and 28 U.S.C. § 1257.

REASONS FOR GRANTING THE PETITION

In its attempt to recognize novel property rights and to overcome the *res judicata* effects of a final federal court Torrens decree, the Colorado Supreme Court has generated multiple independent conflicts of authority with precedents of this Court and other courts of appeals or state supreme courts. Any of these conflicts independently would justify certiorari, and the presence of all of them demonstrates the importance of this Court's review of the unprecedented decisions below that undermine security of title in real property.

I. THE DUE PROCESS RULING BELOW CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS AND STATE SUPREME COURTS.

The Colorado Supreme Court's due process holdings have created a split of authority on two important constitutional

issues: (1) whether a state satisfies due process in quieting title if its statutory notice requirements are reasonable, and (2) whether a current landowner can assert the personal due process rights of his predecessor in interest.

A. The Decision Below Conflicts With This Court's Rule That Due Process Is Determined By The Reasonableness Of Statutory Notice Requirements, Not Of Private Action.

This Court has repeatedly held that under the Due Process Clause of the Fourteenth Amendment, a State may not deprive a person of property in a judicial proceeding unless it requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Walker* v. *City of Hutchinson, Kan.*, 352 U.S. 112, 115 (1956); *Greene* v. *Lindsey*, 456 U.S. 444, 448 (1982); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983); *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 484 (1988). Under *Mullane*, "'"[t]he criterion is not the possibility of conceivable injury but the just and reasonable character of the *requirements*."'" *Dusenbery* v. *United States*, 534 U.S. 161, 170-71 (2002) (emphasis added) (quoting *Mullane*, 339 U.S. at 315 (quoting *Zeiss*, 219 U.S. at 67)).

In contravention of this "straightforward test," *id.* at 167-68, the Colorado Supreme Court has fashioned a novel "dual standard" under the Due Process Clause. App. 149a. It requires a showing not only that "the means selected was reasonably calculated to reach interested parties," but also that "*the party giving notice* had exercised due diligence to ascertain the identities of interested parties." *Id.* (emphasis added); App. 15a. According to the state court, the Due Process Clause begets tort-like duties, such that a constitutional violation occurs if the private litigant's efforts

fail to measure up to an objective "reasonably prudent applicant" standard. *Id.*

In so ruling, the Colorado Supreme Court failed to grasp the fundamental principle that whether a State has provided "due process" depends on the adequacy of its notice *procedures*, and not whether it would have been reasonable for a private litigant to do more, based on what he knew or should have known. See *Greene*, 456 U.S. at 450 (using the *Mullane* test to "evaluate the procedures employed in this case"). As Justice O'Connor has summarized *Mullane*, "[t]he key focus is the 'reasonableness' of the *means chosen by the State*." *Mennonite*, 462 U.S. at 801 (O'Connor, J., dissenting) (emphasis added) (quoting *Mullane*, 339 U.S. at 315).

The state court's error has drawn it into square conflict with this Court's decision in *Zeiss*, which dealt with a quiet title statute passed in California in the aftermath of destruction of public records in the San Francisco earthquake. That statute authorized the quieting of title against all persons, but required a recording of the pending action, publication notice, posting of the summons at the property, and (much like the statute in this case) personal service on known claimants, supported by an affidavit "of a want of all knowledge of the existence of other claimants than as disclosed in his affidavit." 219 U.S. at 66; App. 147a n.23 (noting that the statute at issue in *Zeiss* "incorporated features of the Torrens registration system"). Zeiss secured a decree from a California court granting him unencumbered title. The American Land Company later challenged the decree because its predecessors-in-interest had received no notice, even though (like respondents here) the company maintained that Zeiss could have easily ascertained their interests and identities with reasonable effort. 219 U.S. at 55.

This Court rejected the due process challenge. It declared that "the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles." *Id.* at 60. Thus, in determining the extent of any

claimant's title to property within its borders, the State "'may provide any reasonable methods of imparting notice.'" *Id.* at 61 (quoting *Arndt* v. *Griggs*, 134 U.S. 316, 320 (1890)). The Court emphasized that the due process inquiry focused upon the reasonableness of the statutory notice procedures that the State had chosen:

> the Fourteenth Amendment does not operate to deprive the States of their lawful power, and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights.

Id. at 66. Reasonable statutory notice requirements constitute due process even if they may not perfectly protect all property interests: "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." *Id.* at 67. If the statutory notice requirements are reasonable, no due process challenge may be founded on a claim that the private litigant could have done more: "As there is no claim that fraud, actual or constructive, was employed by Zeiss in obtaining the judgment complained of, and the proceedings conformed to the California statute, the considerations previously stated entirely dispose of this question." *Id.* at 71.

Contrary to the decision below, *Mullane* reaffirmed the rule of *Zeiss* that a State provides due process if its notice requirements are reasonable under the circumstances. *Mullane* dealt with the constitutionality of a state banking law that only required the trustee of a common fund to give publication notice to beneficiaries of a judicial settlement of accounts. 339 U.S. at 309-10. In setting forth its "reasonably calculated" standard for notice, the *Mullane* Court expressly

approved *Zeiss*'s holding that "'[t]he criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'" *Id.* at 315. The Court determined the reasonableness of the statutory notice requirements by balancing "the interest of the State" in providing for final dispositions of the property at issue against "the individual interest sought to be protected by the Fourteenth Amendment." *Id.* at 313-14. As in *Zeiss*, the Court in *Mullane* granted the State some latitude to choose what form of notice was required. The Court did not deem it "unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee"; "impracticable and extended searches are not required in the name of due process," and in such "practical matters" the Court would be reluctant "to disturb the judgment of the state authorities." *Id.* at 317-18. The Court declared the state law unconstitutional only as to those beneficiaries whose identity and whereabouts were actually known to the trustee. *Id.* at 320.

Mullane thus did not, as the Colorado Supreme Court surmised, "establish[] a dual standard" for due process in which the reasonableness of the private party's actions are part of the equation. App. 149a. Nor did it hold that the common fund "trustee had erred in not personally notifying those beneficiaries whose names and addresses were easily obtainable." App. 14a. *Mullane* addressed itself strictly to the balance struck in the state statute. Likewise, as the dissent below pointed out, App. 168a n.6 (Vollack, J., dissenting), *Zeiss* decided the due process question based on the "'"just and reasonable character of the requirements"'" imposed by the State. It did not hold, as the court below supposed, "that due process principles require *plaintiffs* in quiet title actions to make diligent efforts to ensure adequate notice to all

potential defendants." App. 147a n.23 (emphasis added).[4] The Colorado Supreme Court has thus improperly engrafted upon *Mullane* a second constitutional requirement that the private litigant exercise due diligence in conformity with "a reasonably prudent applicant" standard. That second prong has no basis in this Court's jurisprudence and places the state court in conflict with *Mullane* and *Zeiss*.

The decisions below also create a conflict with longstanding decisions of other state supreme courts, which have upheld Torrens Act decrees against due process challenges strictly based upon the reasonableness of the statutory requirements. See, *e.g.*, *Drake* v. *Fraser*, 179 N.W. 393, 395 (Neb. 1920) ("These provisions for notice are as full and broad as the Legislature could reasonably be expected to devise as to all living persons and all unknown claimants, and, upon settled authority, constitute, as to all such persons, due process of law as that term is used both in the state and federal Constitutions.").[5]

There can be no doubt that the elaborate notice requirements of the Torrens Act satisfy due process. The Act requires the applicant to file a sworn application listing all recorded and known claimants, occupants, or lienholders, and

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[4] Nor can the Colorado Supreme Court draw support from any of the other cases of this Court that it cited, App. 149a-150a; each dealt only with the constitutionality of state statutory requirements. *See Walker*, 352 U.S. at 115; *Schroeder* v. *City of New York*, 371 U.S. 208, 211 (1962); *Mennonite*, 462 U.S. at 792-94; *Tulsa Prof'l*, 485 U.S. at 489-91.

[5] *City of New York* v. *Wright*, 152 N.E. 472, 473 (N.Y. 1926) (Cardozo, J.); *Ashton-Jenkins Co.* v. *Bramel*, 192 P. 375, 378 (Utah 1920); *Title & Document Restoration Co.* v. *Kerrigan*, 88 P. 356, 363 (Cal. 1906); *Tyler* v. *Judges of the Court of Registration*, 55 N.E. 812, 816 (Mass.) (Holmes, J.), *writ of error dismissed*, 179 U.S. 405 (1900). The decisions below also conflict with the rule applied by federal courts of appeals to other notice laws. *See Walthall* v. *United States*, 131 F.3d 1289, 1294-95 (9th Cir. 1997); *Amstar Corp.* v. *S/S Alexandros T.*, 664 F.2d 904, 910-12 (4th Cir. 1981).

then requires a court-appointed title examiner to make an independent inquiry regarding the same. All identified parties are directly served, and publication notice is given to unknown claimants. See *supra* at 8. The State was not bound to anticipate the peculiarities of this case; the constitutionality of procedures is determined by "the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976); *Greene*, 456 U.S. at 451.

Security of title is an "essential state interest" that "'inheres in the very nature of [state] government.'" *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting *Zeiss*, 219 U.S. at 60). Colorado has adopted the Torrens Act for the benefit of not only registrants but also creditors, lessees, lienholders, subsequent purchasers and other stakeholders. Where the state notice requirements are reasonable, and have been adjudged by the court issuing the decree to have been satisfied, the Due Process Clause does not require the unsettling of title years after the fact if a different court determines that the applicant was not reasonably prudent in his efforts to identify potential claimants. *Zeiss*, 219 U.S. at 71. The dissenting justices below noted the significance of the majority's unwarranted constitutional holding:

> The majority does violence to this state's system of securing title and irreparably harms the marketability of land in this state. The majority opinion reaches not only titles obtained through Torrens actions, but also, by implication, all land ownership determinations made in quiet title actions. The provisions for naming defendants in quiet title actions and providing them notice differ little from similar provisions in the Torrens Act.

App. 171a (footnote omitted). Indeed, the general due process rule announced by the court below affects every judicial proceeding in which notice is required to be given. Because of the conflicts of authority and the importance of this issue, this Court should grant review.

B. There Is A Conflict Over Whether A Successor Can Assert The Due Process Rights Of A Prior Landowner.

It is a fundamental principle that "constitutional rights are personal," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), and therefore "'a litigant may only assert his own constitutional rights or immunities,'" *McGowan* v. *Maryland*, 366 U.S. 420, 429-30 (1961) (quoting *United States* v. *Raines*, 362 U.S. 17, 22 (1960)).

The Colorado Supreme Court violated that principle by holding that "successors" to "landowners not personally named and served in the 1960s Torrens action ... are not barred from bringing their present claims" because the prior landowners were denied due process. App. 29a; see also *id.* at 25a. The successors themselves were not denied due process; they had no right to notice in the 1960's Torrens Act and quiet-title proceedings because they had no property rights in the Taylor Ranch at the time. Even if *arguendo* their predecessor's due process rights were violated, such rights are personal to the predecessors. The *profits à prendre* recognized by the Colorado Supreme Court may run with the land, but the predecessors' due process rights do not. The Torrens and quiet-title decrees extinguished any *profits à prendre* in the Taylor Ranch to which Costilla County landowners may have been entitled, and no due process challenge was brought by the predecessors. Respondents cannot assert the due process rights of their predecessors to revive extinguished property rights.

The Colorado Supreme Court's error on this point has created a direct conflict with the United States Courts of Appeals for the Tenth Circuit and a number of other courts. In *Kemmerer Coal Co.* v. *Brigham Young University*, 723 F.2d 54 (10th Cir. 1983), the university had filed suit to quiet title to certain property it had obtained through tax deeds. It was opposed by Kemmerer, which claimed that the tax deed was void for lack of due process since Kemmerer's

predecessor in interest (San Rafael) received no notice of the tax sale even though San Rafael owned the property at the time of the sale. The Tenth Circuit held that Kemmerer lacked standing to assert San Rafael's due process rights:

> Kemmerer itself has suffered no due process injury. If a constitutional violation occurred, it was the taking of *San Rafael's* property without due process. Kemmerer thus seeks to advance its claim by asserting a third-party's constitutional rights. "[T]he general rule is that 'a litigant may only assert his own constitutional rights or immunities.'" *McGowan* v. *Maryland*, 366 U.S. 420, 429 ... (1961) (quoting *United States* v. *Raines*, 362 U.S. 17, 22 ... (1960)). This rule has been applied to bar a grantee's assertion that its grantor's due process rights were violated.

Id. at 57 (alteration in original) (citations omitted). The rule below is also in direct conflict with the rules of the United States Court of Appeals for the First Circuit and the supreme courts of Nevada and Utah, which like *Kemmerer* invoke these principles to bar real-property claimants from asserting due process or other constitutional rights of their predecessors in interest. See *United States* v. *Haddon*, 550 F.2d 677, 681 (1st Cir. 1977); *Shelledy* v. *Lore*, 836 P.2d 786, 789-90 (Utah 1992); *Hewitt* v. *Glaser Land & Livestock Co.*, 626 P.2d 268, 269 (Nev. 1981).

In line with the decision below, the United States Court of Appeals for the Fourth Circuit has allowed landowners to invoke the due process rights of their predecessors in interest in a quiet title action. *United States* v. *Chatham*, 323 F.2d 95, 99-100 (4th Cir. 1963). There is thus a deep and mature 4-2 split over this important issue of constitutional law, which can arise in any quiet-title action. This Court's immediate review is particularly critical because the federal court of appeals with jurisdiction over Colorado (the Tenth Circuit) has a different rule than the state supreme court, which will invite forum shopping.

II. THERE IS A CONFLICT OVER WHETHER UNITED STATES LAW GOVERNS PRIVATE PROPERTY UPON CESSION OF FOREIGN TERRITORY TO THE UNITED STATES.

Although the Colorado Supreme Court never should have reached the merits, its rulings have generated additional conflicts that warrant resolution by this Court.

The first of these rulings concerns the critical issue of what law governs claims of private property rights arising prior to statehood. The Colorado Supreme Court held "that the landowners cannot claim rights under Mexican law" because "[t]heir predecessors in title did not settle on the Sangre de Cristo grant until after the land was ceded to the United States and thus their use rights developed under United States law." App. 58a-59a (footnote omitted). The court then proceeded to grant respondents rights under the common law.

This holding is in direct conflict with the rule announced by Justice Marshall in *American Insurance Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), and frequently reaffirmed since, that when the United States acquires territory, the previous sovereign's law that "regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state." *Id.* at 542.

> "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. ... [T]he rule is general, that a change of

> government leaves them in force until, by direct action of the new government, they are altered or repealed."

Vilas v. *City of Manila*, 220 U.S. 345, 357-58 (1911) (quoting *Chicago, Rock Island & Pac. Ry.* v. *McGlinn*, 114 U.S. 542, 546 (1885)); *Leitsendorfer* v. *Webb*, 61 U.S. (20 How.) 176, 177 (1857) (applying same rule to territory of New Mexico). Naturally, the decision below also conflicts with decisions of federal courts of appeals and state supreme courts that are faithful to this Court's long established rule. See, *e.g.*, *In re Chavez*, 149 F. 73, 75-76 (8th Cir. 1906); *City of Los Angeles* v. *City of San Fernando*, 537 P.2d 1250, 1275 (Cal. 1975) (en banc); *Barnett* v. *Barnett*, 50 P. 337, 339 (N.M. 1897).

Indeed, this rule is so settled that it was acknowledged below by respondents, Opening Br. at 53 n.78, No. 00SC527 (Colo. 2001), which is why they sought to assert rights of settlers under Mexican law and based their common-law prescription claims on events from the late 19th century to the present. The Colorado Supreme Court, however, struck out on its own in purporting to recognize common-law easements that were "granted and exercised from the time of settlement," App. 67a, most of which occurred during the 1850's.[6] In so doing it ran afoul of this Court's precedents. American common law did not spring into effect when "the land was ceded to the United States," *id.* at 58a. To the contrary, Mexican property law remained in effect after the cession of the New Mexico territory in 1848, until the Colorado territorial legislature adopted the common law in 1861, *Vogts* v. *Guerrette*, 351 P.2d 851, 855 (Colo. 1960). This holding, which is critical to the grant of rights to respondents below, is irreconcilable with the precedents of this Court.[7]

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[6] App. 58a n.4; *id.* at 52a ("In the early 1850s, Beaubien successfully recruited farm families to settle the Colorado portion of the Sangre de Cristo grant."); *Sanchez*, 377 F.3d at 735.

[7] If the Colorado Supreme Court had applied the proper rule of law, no respondent could claim common-law rights *after* 1861 derived from the

III. THERE IS A CONFLICT OVER WHETHER PRIVATE PROPERTY RIGHTS SURVIVE A CONGRESSIONAL CONFIRMATION OF ABSOLUTE TITLE IN ANOTHER PARTY.

There is also a direct conflict now between the Colorado Supreme Court and this Court, the Tenth Circuit, and the Supreme Court of New Mexico, over whether private property claims survive a congressional confirmation of absolute title in another party.

The decision below cannot be reconciled with this Court's decision in *Tameling* and subsequent decisions. There, the Court recognized that the congressional confirmation of title

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original settlers who were already on the land. As the court itself noted, all three types of implied easements that it recognized under the common law arose when the settler first came on the land:

> it was the unique circumstances surrounding Beaubien's Mexican land grant and his promises to the original settlers which gave rise to the implied easements providing the settlers' successors with their rights of access. These easements appurtenant to the land were all created at the same time and stem from the actions and intentions of Beaubien.

App. 9a. The court's theory of prescriptive easement was premised on the notion that Beaubien "intended, but imperfectly executed" the easement when he gave settlers land rights. App. 77a. Similarly, the theory of easement by estoppel was that Beaubien, in supposed fulfillment of the conditions of his Mexican grant, induced a substantial change in position by the original settlers when they "moved onto the land and established permanent farms" in reliance on the implied promise that they would have access rights on the Taylor Ranch. *Id.* at 79a. Finally, the theory of easement from prior use was that Beaubien granted access rights when he severed portions of the estate and granted land to settlers, since allegedly there was a prior use of the Taylor Ranch for wood and grazing before the severance. *Id.* at 80a-81a. In short, the Colorado Supreme Court purported to recognize common-law rights arising at the time the land was originally settled, but the common law was not in effect at that time. Respondents claiming rights derived from settlement in the 1850's could only base their present-day claims on Mexican law, and any such rights that may have existed were extinguished by the 1860 confirmation of absolute title in Beaubien. *Sanchez*, 377 F.2d at 737; *infra* at 28-30.

in Charles Beaubien, petitioners' predecessor in interest, was "absolute and unconditional" and "operative for the entire tract." 93 U.S. at 663. Confirmation "passes the title of the United States as effectually as if it contained in terms a grant *de novo*," *id.*, and thus "legislative confirmation perfects the title to the particular tract." *Langdeau* v. *Hanes*, 88 U.S. (21 Wall.) 521, 530-31 (1874). Congress had an obligation to respect private property rights in land acquired from Mexico, but it also had the prerogative to devise the means for determining those rights, securing the remainder for the public domain. *Tameling*, 93 U.S. at 661. It was incumbent upon the Mexican settlers, from whom respondents derive their purported rights, to have asserted their claims in the 1854 Act proceedings, if they believed themselves to have property rights. Once Congress confirmed title in Beaubien, that confirmation is equally conclusive against third-party claims to the property, *id.* at 663, unless the third party can "show that the lands embraced in it had been previously granted by the Mexican government to some other person." *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 139 U.S. 569, 580 (1891). Just as claims of a pre-existing right to occupancy are extinguished by a grant from the United States, *Barker*, 181 U.S. at 490, so too are respondents' claims of access rights extinguished by congressional confirmation of absolute title in Beaubien.

By disregarding the rule of *Tameling*, the Colorado Supreme Court also brought itself into conflict with the Tenth Circuit. Indeed, this conflict could not be starker, since the two cases deal with the very same property. In *Sanchez*, the Tenth Circuit, relying on *Tameling*, held that Costilla County landowners do not have *profits à prendre* rights on the Taylor Ranch derived from the original Mexican settlers. 337 F.2d at 737. The Colorado Supreme Court has now held that they do. If *Sanchez* is not *res judicata* (as it should be, see *supra* at 17-23), at a minimum it diametrically conflicts with the decision

below on the issue of whether a congressional confirmation of absolute title extinguishes claims of prior property rights.

The decision below also conflicts with the ruling of the New Mexico Supreme Court in *H.N.D. Land Co.* v. *Suazo*, 105 P.2d 744 (N.M. 1940). In *Suazo*, as here, a ranch owner sought to quiet title in his land, relying upon the congressional confirmation of absolute title in fee simple in its predecessor in interest in the 1860 Act of Confirmation. The New Mexico Supreme Court, invoking *Tameling* and other cases of this Court, rejected the claims of prior rights derived from Mexican settlers, and held that courts "are concluded by the act of congress in confirming such grants, and cannot go behind them." *Id.* at 746-48. The Colorado Supreme Court's decision below, by recognizing prior rights in Mexican settlers despite the confirmation of the absolute title in Beaubien by Congress, is irreconcilable with *Suazo*. See App. 102a (Kourlis, J., dissenting).

The conclusiveness of confirmatory grants under the Act of Confirmation is a critical issue throughout the West, and many ranches (like Taylor Ranch) have associated title issues based on potential claims derived from Mexican settlers. The conflict of authority is in special need of resolution because the federal and state courts with jurisdiction in Colorado apply different rules and reach different outcomes in regard even to the very same land.

In sum, the decisions below in every aspect offend the rule of law and render property insecure. The state supreme court reached the result only by announcing rules that squarely conflict with the precedents of this Court and other lower courts, and it is thus imperative that this Court grant review and restore certainty to title in land.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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September 5, 2003

APPENDICES

APPENDIX A

SUPREME COURT OF COLORADO
EN BANC

No. 00SC527

EUGENE LOBATO; Zack Bernal; Gabrielita Adeline Espinosa; Edward Espinosa; Pete E. Espinosa, Jr.; Corpus Gallegos, by and through his conservator Yvette Gallegos; Gloria Gallegos; Rupert Gallegos; Raymond Garcia; Charlie Jacquez, Jr.; Adolph J. Lobato; Bonifacio "Bonnie" Lobato, by and through his conservator Teresa Lobato; Carlos Lobato; Emilio Lobato, Jr.; Jose F. Lobato; Presesentacion J. Lobato; Gloria Maestas; Norman Maestas; Robert "Bobby" Maestas; Raymond J. Maestas; Eugene Martinez; Mark Martinez; Agatha Medina; Gilbert "Andres" Montoya; Shirley Romero Otero; Eppie Quintana; Lucille Samelko; Arnold Valdez; Ervin L. Vigil; Larry J. Vigil; Michael J. Vigil; Billy Alire; Robert Atencio; Frances D. Berggran-Buhrles; Jose Fred Carson; Elmer Manuel Espinosa; Margurito Espinosa; Moises Gallegos; Ruben Gallegos; Richard J. Garcia; Manuel Gardunio; Ruben Herrara; Jeffrey Jacquez; Adelmo Kaber; Crucito Maes; Daniel Martinez; David Martinez; Jesse Martinez; Leonardo Martinez; Rosendo Martinez; Solestiano Martinez; Alfonso Medina; Gilbert Medina; Leandardo Medina; Loyola Medina; Marvin Medina; Orry Medina; Raymond N. Medina; Rudy Montoya; Gurtrude C. Olivas; Eppy Wayne Quintana; Robert Romero; Shirley Romero; Anthony Sanchez; Bonnie Sanchez; Eugene Sanchez; Evan Sanchez; James Sanchez; Jose G. Sanchez; Rufino Sanchez; S.R. Sanchez; Vernon Sanchez; Ronald A. Sandoval; Elesam Santistevan; Daniel Segura; Floyd R. Solan; Carolyn Taylor; Sam Valdez; Martha Vialpondo; Joe P. Vigil; and Walter Vigil,

Petitioners,

v.

ZACHARY TAYLOR, as executor of the Estate of Jack T. Taylor, Jr., deceased; The Taylor Family Partnership; J. Hoy Anderson; Marvin Lavern Stohs; Edythe Kelly Stohs; Charles W. Gelderman; William F. Phinney; Harlan A. Brown; Dena F. Fuhrmann; Jimmy C. Crook; Freeland D. Crumley; Joseph P. Campisi; Hugh R. Denton; Robert Paul Resteli; Eugene J. Kafka; Avis M. Anderson; Clifford R. Jenson; Don W. Jacobs; Raymond E. Gauthier; Francis P. Heston; and Howard G. Frailey,

Respondents.

April 28, 2003

As Modified on Denial of Rehearing June 16, 2003.*

Chief Justice MULLARKEY delivered the Opinion of the Court.

Today's opinion is the third in a trilogy of decisions that we have issued construing some of the oldest property rights in the state. Involved are access rights to a large, mountainous tract of land in southern Costilla County, Colorado known as the Taylor Ranch.[1] These property rights trace their origins to the time before Colorado's statehood when southern Colorado was still a part of Mexico.

The Costilla County landowners, whose property rights are at issue, are the present-day descendants of 1850s frontier

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* Justice KOURLIS and Justice RICE would grant the respondent's Petition for Rehearing; Justice COATS does not participate.

[1] As referenced in our decision in *Lobato v. Taylor*, 2002 WL 1360432 *1, *2, ___ P.3d ___, ___ (Colo. June 24, 2002), *the Taylor Ranch includes those lands known as the Salazar estate, purchased by Jack Taylor in 1973. As such, our decision in the present case also applies to the Salazar estate.*

farming families who were recruited by Carlos Beaubien to move north from the Taos area in New Mexico and settle in what is now southern Colorado.

Beaubien acted from self interest: without settlers, he could not perfect his rights to the one million-acre Sangre de Cristo land grant because the Mexican government made settlement an express condition of the grant to Beaubien. To convince these families to move north, Beaubien granted the settlers access to the wooded, mountainous area to graze their animals, gather firewood, and harvest timber to build their homes and outbuildings. Without these property rights, subsistence farming on the valley floor would have been impossible.

At trial, many current residents of Costilla County testified that, for over one hundred years, the use of these rights was widespread by the families residing in the region. These residents testified that it was general knowledge in their communities that the Taylor Ranch could be used to graze their animals, gather firewood, and collect timber. According to trial testimony, the mountainous tract purchased by Taylor had been known simply as "la merced," roughly translated from Spanish to mean the gift or grant.

Our prior decisions have recited the history of the landowners' property rights up to the present day in detail. To summarize the roots of today's conflict, Jack Taylor purchased the Taylor Ranch in 1960. After purchase, he fenced off the property, patrolled the area with armed guards, and instituted a Torrens Title action in federal court in order to extinguish the landowners' property rights. His lawsuit gave personal notice to a small fraction of the predominantly Spanish-speaking, Costilla County landowners. The great majority of the landowners received notice only by publication. Taylor subsequently was successful in extinguishing the landowners' property rights.

In our first decision, *Rael v. Taylor*, 876 P.2d 1210 (Colo.1994), we determined that due process required that Taylor exercise reasonable diligence in the Torrens action to identify and personally serve all reasonably ascertainable persons with an interest in his property. We remanded the case for development of the facts, concluding that the appellate record was inadequate to permit us to determine whether Taylor had met the due process standard. *Id.* at 1228.

After the trial court developed the record on remand, the case was appealed for the second time. In our second decision, we held that the landowners have the same property rights as the original settlers to reasonably access the Taylor property for grazing animals, gathering firewood, and harvesting timber. *Lobato v. Taylor*, 2002 WL 1360432 *1, ___P.3d___, ___ (Colo. June 24, 2002) ("*Lobato I*"). As we explained in *Lobato I*, the rights Beaubien granted to the settlers were profits a prendre or, in more modern parlance, easements appurtenant to the land owned or occupied by the original settlers. *See* Reststement (Third) of Prop.: Servitudes § 5.2 (2000).

In this third opinion we resolve several remaining issues: (1) which present-day landowners may claim access rights to the Taylor Ranch; (2) whether Taylor met the due process requirements outlined in our first opinion when he gave notice to the landowners of his Torrens action; and (3) whether res judicata [2] bars the claims of the landowners who were personally named and served in the Torrens action.

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[2] We have previously expressed our preference for the term "claim preclusion" over the term "res judicata." *Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 196 n. 11 (Colo.1999). As the United States Supreme Court has noted, the use of the phrase res judicata may lead to confusion because it has been used to refer to both claim and issue preclusion. *See Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). In this opinion, we use the term res judicata to be consistent with our terminology in *Rael v. Taylor*, 876 P.2d 1210.

Our decision can be summarized as follows. First, we conclude that reasonable access rights to the Taylor Ranch are available to Costilla County landowners who are successors in title to the original settlers of Beaubien's grant. For practical purposes, landowners who are able to trace the settlement of their property to at least the time of William Gilpin's ownership of the Taylor Ranch shall be deemed successors in title to the original settlers of Beaubien's grant.

Second, we hold that the publication notice given by Taylor when he initiated his Torrens action violated due process. The facts developed at trial show that Taylor knew Costilla County landowners claimed rights to use the ranch and that reasonable diligence would have identified the names and addresses of the landowners.

Third, we hold that res judicata applies and precludes the claims of those Costilla County landowners and their successors who were personally named and served in the 1960s Torrens action.

Thus, we reverse the trial court's due process/res judicata decision and return the case to the court of appeals for remand to the trial court. We direct the trial court to identify all landowners who have access rights to the Taylor Ranch and to enter all necessary and appropriate orders to safeguard those rights.

I. Facts and Procedural History

In order to fully understand the due process and res judicata issues before this court today, it is important to review the circuitous procedural history that has led to today's decision. Because the facts of this case have been fully detailed in our prior decision, *Lobato I*, 2002 WL 1360432 at *1-4, ___P.3d at ___, we now discuss only those facts that are relevant to the due process/res judicata inquiry presented in this case.

The petitioners, landowners in the Culebra River Drainage[3] region of Costilla County, claim access rights to the Taylor Ranch. These access rights had been granted to the original settlers in Costilla County and had been utilized for over one hundred years. In 1960, Jack Taylor purchased the Taylor Ranch and forcibly excluded landowners by fencing the land. Soon after, Taylor sought to quiet title in the land via a Torrens Action[4] that he filed as a diversity action in the federal district court in Denver. Taylor's exclusive ownership of the Taylor Ranch was subsequently confirmed in 1967. *Sanchez v. Taylor,* 377 F.2d 733 (10th Cir.1967).

In 1981, the landowners filed suit in the Costilla County District Court to regain access to the land. The trial court dismissed the landowners' claims, holding that the 1960s Torrens action precluded the suit. The landowners then appealed to this court arguing that the notice publication procedure adopted by Taylor in the Torrens action violated their rights to due process. We reversed and remanded the case because of our concerns about disputed issues of material fact and the constitutional validity of the Torrens

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[3] On appeal, the petitioners limit their claims to landowners in an area they define as the Culebra River Drainage, located in the southern part of Costilla County, Colorado. At trial, the petitioners identified this specific area of land in conjunction with their efforts to certify a class. The trial court never made any factual findings regarding this proposed area and whether it accurately represented the entire scope of Beaubien's grant. Subsequently, the trial court denied their motion for class certification. Because no factual findings were made regarding the proposed boundaries, we do not rely on them. Any individual able to meet the requirements set forth in this opinion will be able to claim access rights to the Taylor Ranch.

[4] Although lauded by legal scholars as a promising alternative to traditional title registration methods, practitioners have been less than enthusiastic in adopting the Torrens system. In fact, Torrens actions are so rare in Colorado that none of the three real estate experts testifying at trial had ever participated in a Torrens proceeding. *See also* Richard W. Laugesen, *The Torrens Title System in Colorado*, 39 Dicta 40, 43 (1962).

action. *Rael v. Taylor*, 876 P.2d at 1228. On remand from this court's decision in *Rael*, we directed the trial court to develop the facts and to determine whether Taylor had exercised reasonable diligence in identifying all persons who claimed interests in the Taylor Ranch and personally served them as defendants in the Torrens action. For any plaintiffs whose claims were not barred by res judicata, the trial court was to determine whether their claims to the Taylor Ranch were meritorious. To better organize the trial process, the trial court bifurcated the proceedings. One trial was held to determine which plaintiffs had been denied due process and whose claims were not barred by res judicata, and a second trial was then held on the merits of the case.

In evaluating whether res judicata barred the landowners' claims, the trial court was required to determine whether the manner in which Taylor served the plaintiffs in his 1960s Torrens action complied with due process. To comply with due process, Taylor was required to serve each individual with an identifiable interest in the Taylor Ranch whose name was also reasonably ascertainable. The trial court dismissed most of the original plaintiffs, finding that only seven could pursue their claims to the Taylor Ranch. Using proof of grazing on the Taylor Ranch as a litmus test, the trial court concluded that although all of the plaintiffs could claim an identifiable interest in the Taylor Ranch, only seven had presented sufficient evidence of grazing practices for them to be reasonably ascertainable to Taylor. Thus, under the trial court's analysis, Taylor violated due process only by not personally naming and serving these seven persons.

During the merits phase of the case, the trial court found that the seven plaintiffs possessed no substantive rights in the Taylor Ranch. The court of appeals affirmed the trial court's merits analysis and did not address the due process/ res judicata decision, finding it moot. This court, in *Lobato I*, reversed the decision of the court of appeals, finding

substantive rights of access through implied easements appurtenant to the land by prescription, estoppel, and prior use. The landowners now challenge the trial court's due process/res judicata decision.

II. Analysis

In addressing the landowners' claims, we first clarify from our decision in *Lobato I* that in order to have actual access rights to the Taylor Ranch, landowners must be able to show that their lands were settled at the time of the creation of the Beaubien document in 1863. For practical purposes, this requirement can be established by tracing settlement of one's property to the time of Gilpin's ownership of the Taylor Ranch. As we will discuss, this qualification comes directly from the nature of the easements at issue in this case.

Second, we review the 1960s Torrens action to determine whether Taylor provided sufficient notice of the Torrens action to comply with due process requirements. We conclude that, under the unique circumstances of this case, Taylor did not exercise reasonable diligence in effectuating proper notice because he did not personally name and serve all reasonably ascertainable persons with an identifiable interest in the Taylor Ranch. Thus, those individuals who should have been personally named and served, and were not, are not barred from presently bringing such claims.

Third, in light of the circumstances of this case, we determine whether res judicata bars those 1960s landowners or their successors in title who were personally named and served in Taylor's 1960s Torrens action. We conclude that res judicata applies, finding that (1) public policy concerns or manifest injustice concerns do not outweigh the interests in applying res judicata; and (2) the misapplication of Colorado law by the federal courts in the 1960s Torrens action does not require waiving res judicata.

A. Identifying Present-Day Landowners with Access Rights

Having concluded in *Lobato I* that successors in title to the original settlers in Costilla County were granted access rights for the reasonable use of pasture, firewood, and timber, we now specify which present-day landowners can successfully claim these access rights to the Taylor Ranch. We hold that only those landowners capable of tracing their settlement claims to the time of the Beaubien document's creation in 1863 have access rights to the Taylor Ranch. In so holding, we explain (1) why later landowners do not have implied easements in the Taylor Ranch pursuant to our decision in *Lobato I;* and (2) why, for practical purposes, landowners claiming access rights must trace settlement of their lands to at least the time of Gilpin's ownership of the Taylor Ranch.

1. Implied Easements were Granted only to the Original Settlers and Their Successors in Title

In *Lobato I,* we held that successors in title to the original settlers in Costilla County were granted access rights to the Taylor Ranch for reasonable use of pasture, firewood, and timber through implied easements by prescription, prior use, and estoppel. *Lobato I,* 2002 WL 1360432 at *1, ___P.3d at ___.

The landowners argue that these access rights should not be limited to landowners able to trace settlement claims to the original settlers, but contend that such rights should be available to all landowners in Costilla County not barred by res judicata. We disagree.

Under the evidence presented in this case, it was the unique circumstances surrounding Beaubien's Mexican land grant and his promises to the original settlers which gave rise to the implied easements providing the settlers' successors with their rights of access. These easements appurtenant to the land were all created at the same time and stem from the actions and intentions of Beaubien. As outlined in *Lobato I,*

Beaubien's intentions and actions were instrumental in the creation of these rights. *Id.* at *14-16, ___ P.3d at ___. There is no evidence in the record to substantiate the argument that access rights to the Taylor Ranch have been created for those individuals who settled after the creation of the Beaubien document.

We thus conclude that only those present-day landowners or their predecessors in title-who are successors in title to those persons who settled Costilla County by the time the Beaubien document was created, can claim rights of access to the Taylor Ranch for reasonable grazing, firewood, and timber.

Having determined which landowners can claim reasonable access rights to the Taylor Ranch, we now explain, for practical purposes, how the landowners can establish these rights.

2. Settlement Rights Must be Traced to the Original Settlers of Beaubien's Grant

In order for present-day landowners to legally gain access rights to the Taylor Ranch, they must first establish that their predecessors in title *settled* their lands at the time of the Beaubien document's creation.[5] Because of the practical impossibility of establishing the exact time of settlement, we hold that a landowner claiming access rights to the Taylor Ranch need only show that his or her land was settled at the last possible time that Beaubien's intentions remained in force. Using the best available evidence, landowners must prove by a preponderance of the evidence that their property is included within the boundaries of property owned or

[5] During the merits phase of the trial court proceeding, the court specifically found that the seven plaintiffs could trace their titles to the time of Gilpin's ownership of the Taylor Ranch. Thus, these individuals need not prove their claims to the Taylor Ranch.

occupied by settlers during the time of Gilpin's ownership of the lands of the Sangre de Cristo grant.[6]

The Mexican government awarded the Sangre de Cristo grant to Beaubien on the condition that he settle the land. To perfect his grant, Beaubien recruited farm families to settle by promising access rights to mountainous lands like the Taylor Ranch. *Lobato I* at *1-2, ___P.3d at ___ - ___. Evidence of Beaubien's promise to give settlers access rights to the land provided the basis for the implied rights to pasture, firewood, and timber. *Id.* at *8-9, ___ P.3d at ___ - ___. Although these families began settling in the 1850s, many of these settlers did not receive the deeds to their lands until 1863, or even later after Beaubien's death in 1864. *Id.* at *2, ___ P.3d at ___.

After Beaubien's death, his lands were sold to Gilpin pursuant to an oral agreement previously negotiated between the two men. In this agreement, Beaubien kept his promise to the settlers and made the sale contingent on Gilpin's agreement to confirm the access rights of the settlers. This agreement is evidenced in the 1864 Gilpin agreement, which states:

> [Gilpin agrees to the] express condition that the settlement rights before then conceded by said Charles Beaubien to residents of Costilla, Culebra & Trinchera, within said Tract included, shall be confirmed by the said William Gilpin as confirmed by him.

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[6] We emphasize that the landowners need not prove a marketable chain of title for their property. As stated in the text, the landowners must use the best available evidence to prove their lands are benefited by the easements Beaubien granted. From the record before us, it appears that the best evidence of benefited properties conveyed by Beaubien is the official 1894 Costilla County survey and inventory of lands held by individuals along the Culebra, Vallejos, and San Francisco Creeks. Of course, we do not foreclose the landowners from presenting other evidence to prove their settlement claims.

Because of this agreement between Beaubien and Gilpin, the original settlers who received title from Gilpin also possessed access rights to the Taylor Ranch.[7] Thus, landowners of Costilla County who are able to show that their property was settled during the time of Gilpin's ownership of the Sangre de Cristo grant or earlier will be granted access rights to the Taylor Ranch for reasonable grazing, timber and firewood.

B. Due Process Requirements of the Torrens Proceeding

Having established which present-day landowners may claim access rights to the Taylor Ranch, we now consider whether Taylor's efforts in notifying potential claimants of his intent to quiet title in the Taylor Ranch were adequate to comply with the requirements of due process. The constitutional sufficiency of Taylor's 1960s Torrens action turns on whether Taylor provided sufficient notice to the landowners to extinguish their property claims in the Taylor Ranch. If the action was not constitutionally sufficient to meet due process requirements, the landowners will not be barred from bringing present-day claims.

To resolve this issue, we review and detail what notice is required by due process. Next, we apply that standard to the facts and evaluate whether the steps taken by Taylor in his attempt to notify interested parties were sufficient to bar future claims.

1. Notice Required by Due Process

The Torrens Title Act is a long-standing, seldom-used feature of Colorado real property law. It is intended to simplify the transfer of title and create certainty by strictly

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[7] We recognize that this standard may be over-inclusive, but considering the grave depravation of rights suffered by the landowners over the past 40 years, we are unwilling to create a standard which may again unlawfully deny some landowners their guaranteed access rights.

limiting attacks on a title registered under the Act. For example, a challenge must be initiated within 90 days of registration and successful claimants may recover only damages, not property rights. § 38-36-131, 10 C.R.S. (2002). Laudable as these goals are, however, the act must yield to the United States Constitution.

To have a preclusive effect on the landowners' current claims, Taylor's Torrens judgment must satisfy the minimum procedural requirements of the Due Process Clause of the Fourteenth Amendment. *Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 481, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Although section 118-10-31, 5 C.R.S. (1953), of the 1960s Torrens Act forecloses any challenges to a court's decree in a Torrens action and although the essential purpose of the Torrens Act is to eliminate attack on decrees of confirmation, the Torrens bar on future challenges cannot be sustained where constitutional deficiencies of notice are present. *Rael v. Taylor,* 876 P.2d at 1224 (citing *Petition of Brainerd Nat'l Bank,* 383 N.W.2d 284, 287 n. 2 (Minn.1986); *Riley v. Pearson,* 120 Minn. 210, 139 N.W. 361, 366 (1913)).

In the seminal case *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the United States Supreme Court recognized that before an action that will affect an individual's interest in life, liberty or property is commenced, state law must provide interested parties with "notice reasonably calculated, under all the circumstances, to apprise [the parties] of the pendency of the action and afford them an opportunity to present their objections." (citations omitted).

The central issue in *Mullane* involved the actions of the Central Hanover Bank and Trust Company in establishing a common trust fund from a total of 113 smaller trusts. This merging of trusts affected the respective property rights of the beneficiaries of these trusts and their ability to control their

assets. The only notice given to the beneficiaries of this created common trust was through publication in a local newspaper.

The Court held that although publication notice for beneficiaries whose interests or addresses were unknown was sufficient to comply with due process, the trustee had erred in not personally notifying those beneficiaries whose names and addresses were easily obtainable. *Id.* at 317, 70 S.Ct. 652. In explaining its reasoning, the Court stated that

> "[t]he reasonableness and hence the constitutional validity of any chosen method [of notice] may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."

Id. at 315, 70 S.Ct. 652 (citations omitted). Under this standard, the Court disapproved of notice by publication for those beneficiaries whose identities and addresses were known because publication was not "reasonably calculated" to provide actual notice.[8]

As to unknown beneficiaries, the Court concluded that notice by publication was sufficient to satisfy due process requirements. The Court reasoned that although the chance that these beneficiaries would be notified by publication was remote, the publication would be as effective as any other method to notify the unknown beneficiaries. *Id.* at 317, 70 S.Ct. 652.

In subsequent cases, the United States Supreme Court has held to the principles of due process outlined in *Mullane. See Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1

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[8] As an alternative to personal service, the *Mullane* Court recognized that service could be adequately undertaken via ordinary mail. *Id.* at 318, 70 S.Ct. 652.

L.Ed.2d 178 (1956) (finding notice of condemnation proceeding published in a local newspaper inadequate to inform an affected landowner whose name was known to the city and in official records); *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962) (holding that publication by newspaper and through posted notices was insufficient to alert property owner of condemnation proceedings where name and address were easily ascertainable from deed records and tax rolls); *Greene v. Lindsey*, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) (concluding that posting a summons on the door of a tenant's apartment was inadequate to provide notice of forcible entry and detainer actions); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) (finding publication and posting of a tax sale of a property was insufficient to notify a mortgagee whose address was reasonably ascertainable and whose interest was publicly recorded).

In *Rael*, we followed the United States Supreme Court's reasoning in *Mullane*. We held that to evaluate the sufficiency of publication notice, due process requires a court to determine "whether under all the circumstances the means selected was reasonably calculated to reach interested parties and whether the party giving notice had exercised due diligence to ascertain the identities of interested parties." *Rael v. Taylor*, 876 P.2d at 1225. This determination of reasonable diligence is an objective test. We look to the actions that a reasonably prudent applicant would have taken under the circumstances, either known or reasonably discoverable by the applicant at the time of filing, to guarantee that interested parties would be identified and served as named defendants. *Id.* at 1226-27. In reference to Torrens Act proceedings specifically, "applicants have a duty to exercise reasonable diligence in identifying all reasonably ascertainable persons *who claim interests in the property and are thus entitled to personal service.*" *Id.* at 1226 (emphasis added). Furthermore, a search for reasonably ascertainable

interested parties need not extend beyond what would be discoverable by diligent inquiry into the public records. *Id.* at 1228 n. 26.

We were unable to apply that test in *Rael* because the facts were not sufficiently developed. *Id.* at 1128. With the facts now before us, we evaluate whether Taylor was required to personally name and serve the plaintiff landowners in his Torrens action. More specifically, we must determine whether Taylor exercised reasonable diligence in discovering all claimants (1) who claimed an identifiable interest in the Taylor Ranch, and (2) whose identities were reasonably ascertainable.

2. Identifiable Interest

The circumstances surrounding Taylor's 1960s Torrens action lead us to conclude that at the time of the Torrens action, all landowners in Costilla County possessed an identifiable interest in the Taylor Ranch.

The trial court in this case found that under the Beaubien document, all the plaintiffs before the court could claim an identifiable interest in the Taylor Ranch. Taylor now argues that the landowners fail to meet this element of the due process analysis, contending that they, as landowners, have no identifiable interest in the Taylor Ranch and that he and his attorneys exercised reasonable care and due diligence in individually naming defendants in his Torrens application. We agree with the trial court determination and find Taylor's argument to be without merit.

Taylor mistakenly assumes that the due process requirements set forth in *Mullane* and its progeny require that, in order for a party's interest to be identifiable, the interest must either be recorded or the party must be in open possession of the interest. Although an "identifiable interest" usually is associated with a recorded interest or an interest that is obvious via actual possession, the case before us is not the

usual case. To the contrary, this is a highly unusual case that proves the Supreme Court's admonishment that constitutionally sufficient notice must be determined by examining the circumstances of each individual case. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. at 314-15, 70 S.Ct. 652. Taking into account the information contained in the Beaubien document, the 1864 Gilpin agreement, Taylor's own deed, the title examiner's report, and other extrinsic facts, Taylor's argument that he could not have reasonably identified and named the landowners must fail.

First, the language of the Beaubien document, the 1864 Gilpin agreement, and Taylor's own deed would have provided a reasonable applicant in Taylor's position with adequate notice that some landowners in Costilla County might have some interest or claim in the Taylor Ranch. Taylor knew he was buying land within the Sangre de Cristo Mexican land grant. The Jenkins translation[9] of the Beaubien document unequivocally provides that

> [i]t has been decided that the Rito Seco lands shall remain uncultivated for the use of the residents of San Luis, San Pablo and the Vallejos, and other inhabitants of said towns, for pastures and community grounds, etc. . . . All the inhabitants shall have the use of pasture, wood, water, and timber and the mills that have been erected shall remain where they are, not interfering with the rights of others.

Although Taylor might credibly contend that the language of the Beaubien document alone was insufficient to provide him with reasonable notice of potential claimants, this argument fails when the Beaubien document is combined with the language in the other two noted documents.

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[9] The trial court found that the Jenkins translation was a true and accurate translation of the Beaubien document from the Spanish to English language.

The instrument of conveyance of the Sangre de Cristo grant to Gilpin from Beaubien's heirs in 1864-contained in Taylor's chain of title-also clearly provides notice to the average reader that landowners in Costilla County might credibly claim access rights to the Taylor Ranch. The Gilpin agreement expressly conditions conveyance to Gilpin on the requirement that "certain settlement rights before then conceded by said [Carlos] Beaubien to residents of the settlements of Costilla, Culebra & Trinchera . . . shall be confirmed by said William Gilpin."

Finally, Taylor's own deed specifically provides that "All of the land hereby conveyed . . . being subject to claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlements [sic] rights in, to and upon said land." With these three documents at his disposal, it is clear that Taylor was on notice that landowners in Costilla County might have an interest in the Taylor Ranch.

In addition to these three documents, Taylor was notified of the landowners' claims through his lawyer who handled the Torrens proceedings. We noted in *Rael* that Taylor's lawyer, Raphael Moses, Esq., had personal knowledge of the claimed interests of the landowners and even acknowledged these interests in 1949 in a letter to some of the same landowners he sought to exclude in the 1960s Torrens action:

> In 1936, Mr. Albert L. Moses gave an opinion to Mr. J.J. Valdez and Mr. J.E. Sanchez that the *owners of land in the Grant who obtained their title through those originally settling the land have the right to go upon the timbered portions of the Grant and take therefrom the necessary fire wood for their own personal uses and the necessary timber for use in connection with the land which they own* . . . and likewise have the right to pasture their own domestic animals, not by herding them upon the land but by permitting them to graze thereon.

> *We still believe that this is the case and that you would have the right to stop anyone who interferes with these rights.*

Rael v. Taylor, 876 P.2d at 1215 n. 7. *See also* Tom Faxon, "An Oral History: Raphael J. Moses," *The Colorado Lawyer*, March 1998, Vol. 27, No. 3, 115 (interview with Moses explaining that the 1960s Torrens action was filed roughly 250 miles from Costilla County in federal court in Denver to avoid possible conflicts with landowners over their access rights).

At the time Taylor commenced his Torrens action, there were approximately 1,913 landowners in Costilla County. Although we recognize that the land referenced in the Beaubien document is not coextensive with the boundaries of Costilla County, other information available to Taylor in the 1960s put Taylor on notice that *all* landowners in Costilla County had potential claims in the Taylor Ranch. The Torrens title examiner's report and other extrinsic information available to Taylor provided such notice.

The court-appointed title examiner assigned to conduct the investigation concerning Taylor's Torrens application was W.W. Platt. In his report, Platt noted that claim rights to the Taylor Ranch to take pasture and wood were asserted by the Association of Civic Rights, which represented "*all owners of land in Costilla County.*" Although Taylor was aware of the Association of Civic Rights and its asserted interests in the Taylor Ranch, he made no effort to name all landowners in Costilla County.[10] In fact, he failed to name these individuals even though his Torrens application specifically addresses the Association of Civic Rights and its claim to usufructuary rights in the Taylor Ranch.

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[10] Even if Taylor was made aware of these claimants only after his Torrens application, he was still responsible for providing them with adequate notice. *See Bray v. Germain Inv. Co.*, 105 Colo. 403, 408, 98 P.2d 993, 995 (1940).

Although Taylor noted in his application that the individuals represented by the Association of Civic Rights were claiming rights to pasture and wood *as landowners,* Taylor argued that this status did not provide them with any identifiable rights in the Taylor Ranch. This contention loses its credibility when considered in light of the title examiner's report. In Platt's report evaluating the propriety of Taylor's Torrens application, the examiner specifically notes that 269 of the people specifically named by Taylor were named only because of their status as landowners. As Platt unequivocally concluded, the only possible interest these 269 people have in the Taylor Ranch would be as "landowners in Costilla County claiming such rights to pasture and wood *solely because they are such landowners.*" (emphasis added). Because these 269 individuals were named in his Torrens application, logic should have dictated that Taylor also name all landowners in Costilla County, considering that both groups claimed their respective interests in the Taylor Ranch solely as landowners of Costilla County.

In sum, as established by the details of Taylor's knowledge in the 1960s, it is clear that Taylor possessed adequate notice that all of the landowners of Costilla County claimed an interest in the Taylor Ranch. Having concluded that Taylor should have recognized that all the landowners of Costilla County claimed an identifiable interest in the Taylor Ranch, we now evaluate whether the identities of these landowners were reasonably ascertainable by Taylor.

3. Reasonably Ascertainable Individuals

With respect to whether the 1960s landowners were reasonably ascertainable by Taylor at that time, the landowners contend that the trial court erred in concluding that the identities of the great majority were not reasonably ascertainable. Conversely, Taylor agrees with the trial court and argues that, aside from those landowners whom he specifically named, he could not have reasonably ascertained other landowners who

claimed an interest in the Taylor Ranch. We disagree with Taylor's assertion and conclude that the trial court ruling was incorrect. Having established that through reasonable diligence, Taylor knew or should have known that all 1960s landowners in Costilla County claimed an interest in the Taylor Ranch, we now conclude that the landowners were reasonably ascertainable and could have been personally notified rather than served by publication.

Specifically, we conclude that the trial court erred in (1) finding that the examination of real estate records was sufficient to locate interested individuals; and (2) relying on grazing as the test for whether the plaintiffs were reasonably ascertainable.

First, the trial court was mistaken in concluding that Taylor was only required to search and examine the real estate records of the Clerk and Recorder in order to diligently ascertain those individuals with an identifiable interest in the Taylor Ranch. Because Taylor had knowledge of the claimed interests of the landowners in Costilla County, reasonable diligence required Taylor to search the Costilla County tax rolls as well.

Although, generally, only documents within a chain of title must be searched to determine relevant interests in real property, more is required where it appears that outside interests may affect title. In such instances, an individual has a duty to investigate these other interests and is charged with knowledge of the facts to which the investigation would have led. *Collins v. Scott*, 943 P.2d 20, 22 (Colo.App.1996) (citations omitted).

That it is sometimes necessary to look beyond standard forms and legal methods is demonstrated by our decision in *Jacobucci v. Dist. Ct.*, 189 Colo. 380, 388, 541 P.2d 667, 672 (1975). In *Jacobucci*, the City of Thornton initiated eminent domain proceedings against, among others, Farmers

Reservoir and Irrigation Company, a mutual ditch company organized by local farmers to enable them to receive irrigable water for their farms. *Id.* at 386, 541 P.2d at 671.

Thornton served only the corporation. *Id.* at 384, 541 P.2d at 669. Finding the individual farmer-shareholders indispensable to the eminent domain proceedings, however, we recognized that the unique circumstances surrounding the creation of mutual ditch companies in Colorado required that we look beyond general corporate law principles. *Id.* at 390, 541 P.2d at 674. Although recognizing that shareholders are generally not considered real parties in interest in condemnation actions, we cautioned that "[d]eductions made from the application of general legal concepts may be dangerously inappropriate as applied to specific contexts." *Id.* at 389, 541 P.2d at 673. In looking beyond legal forms, we reasoned that the farmer-shareholders were real parties in interest because, in practical terms, "[t]he productivity and value of [the farmer-shareholder's] lands, as well as the assurance of their livelihoods, is . . . entirely dependent upon the continuing flow of water. . . . No court can ignore the magnitude of [disruption] which would result in a successful condemnation action." *Id.* at 391, 541 P.2d at 675. We thus required Thornton to individually serve shareholders whose water would be impacted by the condemnation. *Id.* at 392, 541 P.2d at 675-76.

The challenges of farming in an arid climate gave rise to the mutual ditch company, an entity that does not easily fit within the confines of corporate law and condemnation actions. We directed that the corporation be disregarded and notice be given to the farmers who had the most to lose in the condemnation action.

The logic of *Jacobucci* applies with equal force here because the facts in this case also reflect the harsh realities of farmers' lives in southern Colorado. The access rights made farming possible in Costilla County. Given Taylor's

knowledge of those access rights, he could not pick and choose whom to notify personally and whom to notify only by publication. Under the circumstances of this unique case, reasonable diligence required that Taylor personally name and serve all landowners in Costilla County.

As noted in *Rael*, the reasonable diligence standard requires that "' [w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendencey.'" *Rael v. Taylor*, 876 P.2d at 1225 (citing *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. at 318, 70 S.Ct. 652). *See also Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (names and addresses are easily ascertainable from tax rolls); *see also Mennonite Bd. of Missions v. Adams*, 462 U.S. at 798 n. 4, 103 S.Ct. 2706 (mortgagee easily ascertainable where only known address listed mortgagee as "'corporation, of Wayne County, in the State of Ohio'").

According to the record, the Costilla County tax rolls provided the names and addresses of every landowner in Costilla County. At trial, Frederick B. Skillern,[11] an expert in

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[11] The trial court heard testimony from three qualified real estate experts, Skillern, Don Lesher, and Willis Carpenter. These experts provided testimony analyzing the Torrens Act and this court's decision in *Rael,* to provide an opinion on what steps a reasonably prudent applicant would take to exercise reasonable diligence in naming and ascertaining all persons claiming an interest in the Taylor Ranch. The trial court found Carpenter's testimony most credible and from this testimony concluded that the only relevant public record that required search and examination was the real estate records of the Clerk and Recorder. The trial court's credibility finding is not a bar to us. These were not fact witnesses but rather lawyers offering their legal opinions. Carpenter's testimony was based on his opinion that the Beaubien document did not create or convey any rights—a position we have rejected as a matter of law. He conceded that the assessor's records would be the easiest way to identify landowners.

the field of real estate law, testified that Taylor could reasonably have accessed the public tax records to obtain the names and addresses of landowners in Costilla County and that the information therein would have been sufficient to effectuate service of process to said landowners. Skillern also testified that Taylor should have conducted this search in order to properly comply with the notice required by due process.

In reviewing the record and relevant case law, we agree with the landowners and conclude that they were reasonably ascertainable by Taylor through a basic search of the tax rolls. Because the names and addresses of the landowners were available through the tax rolls, Taylor's efforts in discovering potential claimants to the Taylor Ranch were not reasonably diligent to comply with due process. Although the number of names and addresses of the landowners might have been large,[12] the process was not complex or difficult.

Second, the trial court arbitrarily applied proof of grazing as a litmus test to determine whether each plaintiff was reasonably ascertainable by Taylor and thus should have been named and served. The trial court's test stated that, "[Taylor] had a duty to ascertain the identity of owners of property that ran cattle or sheep within a reasonable proximity to [his] land and name and personally serve such person."

The trial court's reliance on grazing alone is inconsistent with our decision in *Lobato I*, which found rights of access for firewood, timber, and grazing. Therefore, we conclude that the trial court erred in relying solely on proof of grazing to determine which plaintiffs were reasonably ascertainable by Taylor.

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[12] At trial, Dr. Robert A. Bardwell, a statistics expert, testified that the 1959 Costilla County tax rolls listed 1,913 landowners in the County. He further testified that, at most, 273 of these landowners were named in Taylor's Torrens action.

As a whole, when taking into account the expert testimony and information at Taylor's disposal at the time he filed his Torrens application, it is clear that Taylor's actions were not sufficiently diligent to comply with due process. Under the circumstances surrounding this case in the 1960s, a reasonably diligent applicant would have personally served all landowners in Costilla County whose names and addresses were available in the county's tax records. Therefore, the claims made by all present-day landowners or their predecessors in title not personally named or served in the 1960s Torrens action are not barred from asserting their claims now, because they cannot be deemed as parties to the Torrens action. As for those landowners or predecessors in interest who were actually served in the 1960s Torrens action, we now explain why they are barred by res judicata from claiming access rights to the Taylor Ranch.

C. Res Judicata Bars Those Landowners Personally Named and Served in the 1960s Torrens Action

Having concluded that Taylor's efforts in notifying potential claimants of his Torrens action were inadequate to comply with the requirements of due process and thus bar the claims of present-day landowners, we now consider whether res judicata should be applied to bar the claims of those individuals who were personally named and served in Taylor's 1960s action to quiet title in the Taylor Ranch. The landowners argue that res judicata should not be applied based on the 1960s Torrens action because of the unique circumstances surrounding this case. We disagree.

The operation of res judicata works to preclude the relitigation of matters that have been litigated already as well as matters that could have been litigated in a prior proceeding. Wright, Miller, & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 4403, 20 (2002). In barring the relitigation of tried matters, res judicata serves distinct and important public and private values. As the United States

Supreme Court has stated, res judicata serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (citations omitted). Underlying these purposes of finality and efficiency is the vital interest in preserving the integrity of the judicial system. Wright, Miller, & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 4403 at 23. Specifically, if one matter could be easily relitigated with inconsistent results, judicial integrity would be compromised and the value of and respect for court rulings would be seriously devalued. Although exceptions to the application of res judicata have been allowed in instances where such application would undermine an important state public policy or result in manifest injustice, *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir.1977), after the United States Supreme Court's decision in *Federated Dept Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), such exceptions are extremely rare.

The landowners offer three reasons for why res judicata based on Taylor's 1960s Torrens action should not apply to this case. First, the landowners argue that res judicata cannot be applied because the federal court in the 1960s action incorrectly applied Colorado law. Second, they argue that application of res judicata would create a manifest injustice in the tightly-knit community because certain landowners would have access to the Taylor Ranch while others would not. Finally, the landowners contend that the application of res judicata here would be contrary to the public policy in Colorado recognizing implied rights in land. Although we recognize that there are occasions in which res judicata cannot and should not be applied, none of the arguments offered by the landowners convinces us that the circumstances surrounding the 1960s Torrens actions present such an occasion.

First, the landowners argue that misapplication of the law should limit the application of res judicata. Specifically, the landowners contend that res judicata should not be applied because the United States District Court and the United States Court of Appeals of the Tenth Circuit in *Sanchez v. Taylor*, 377 F.2d 733, wrongly interpreted Colorado law in holding that the landowners had no access rights to the Taylor Ranch as evidenced by our decision in *Lobato I.* We disagree.

The application of res judicata is not thwarted simply because a prior, final ruling was based on law subsequently overruled. *See Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499 (11th Cir.1984) (finding res judicata applicable despite a subsequent reinterpretation of Alabama's statute of limitations no longer barred claims as untimely filed). Res judicata cannot be so easily avoided here simply because the federal courts in the 1960s's Torrens action misinterpreted Colorado law. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. at 398-99, 101 S.Ct. 2424 ("the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong. . . . 'The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert.'") (quoting *Reed v. Allen*, 286 U.S. 191, 201, 52 S.Ct. 532, 76 L.Ed. 1054 (1932)).

Although cases exist where a misapplication of the law has resulted in the waiver of res judicata, such cases strictly involved instances in which the legal correction was based on significant changes in fundamental constitutional rights. *See e.g., Christian v. Jemison*, 303 F.2d 52, 55 (5th Cir.1962) (res judicata not applied to state court judgment after Supreme Court overruled separate-but-equal doctrine in *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)). Although the circumstances surrounding the exclusion of

landowners served in Taylor's 1960s Torrens action are unfortunate, the federal courts' erroneous interpretation of Colorado law is not of such constitutional magnitude as to compel this court to overlook the long-standing and important principles supporting the application of the res judicata doctrine.

The landowners next argue that the application of res judicata should be waived because the bar will result in a manifest injustice whereby some landowners in the Costilla County community would be granted access rights while others would not. As expressed in *Moitie*, inequities resulting from the application of res judicata will not easily outweigh the principles supporting its application. *Federated Dept Stores, Inc. v. Moitie*, 452 U.S. at 400, 101 S.Ct. 2424; *E.E.O.C. v. U.S. Steel Corp.*, 921 F.2d 489 (3d Cir.1990) (finding that res judicata barred the relitigation of illegal discrimination claims against an employer although some similarly situated employees were awarded relief and others were not).[13] Although the possible creation of divisions within the local community would be troubling, we do not find that these divisions would rise to the level of creating a manifest injustice.

Finally, the landowners contend that applying res judicata would be contrary to public policy in Colorado recognizing implied rights in land. Contrary to the landowners' contentions, we find that applying res judicata based on the 1960s Torrens action serves the more important general public policy interest that there be an end to litigation, *Federated Dept Stores, Inc. v. Moitie*, 452 U.S. at 401, 101 S.Ct. 2424, as well as Colorado's interest in ensuring that real estate titles are secure and marketable. *Agee Revocable Trust*

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[13] For federal courts, the United States Supreme Court's decision in *Moitie* has virtually extinguished a general fairness exception to res judicata. Wright, Miller, & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 4415 at 379.

v. Mang, 919 P.2d 908, 910 (Colo.App.1996); § 38-34-101, 10 C.R.S. (2002) ("it is declared to be the policy in this state that . . . laws concerning or affecting title to real property . . . shall be liberally construed with the end in view of rendering such titles absolute and free from technical defects so that subsequent purchasers . . . may rely on the record title.") In balancing these interests, the public policy interests which favor the finality provided by res judicata outweigh any public policy interests served by recognizing implied rights in land.

Although we are sympathetic to the deeply-held views expressed by the landowners, under the law, we can find no facts, inequities, or public policy considerations which outweigh those vital purposes inherent in the application of res judicata. Thus, res judicata will bar the claims of those landowners personally named and served in Taylor's Torrens action.

III. Conclusion

In conclusion, we clarify that reasonable access rights to the Taylor Ranch will be available for those present-day landowners in Costilla County who are successors in title to the original settlers of Beaubien's grant, proved by showing that their lands were settled at the time of Gilpin's ownership of the Taylor Ranch.[14]

Applying the due process analysis of *Rael* to the facts developed on remand, we hold that those 1960s landowners not personally named and served in the 1960s Torrens action, or their successors, are not barred from bringing their present claims. Finally, we conclude that res judicata precludes the claims of those landowners or their successors who were personally named and served in the 1960s Torrens action.

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[14] Due to the large number of potential claimants, the trial court should revisit the issue of class certification.

In light of our holding that Taylor failed to exercise reasonable diligence in personally naming and serving all reasonably ascertainable individuals with an identifiable interest in the Taylor Ranch, the cost of remedying this failure on remand must be borne by Taylor. In Colorado, costs are awarded to the prevailing party unless mandated otherwise by statute. C.R.C.P. 54(d). Because the plaintiff landowners have prevailed on their claims, Taylor now must pay the costs associated with identifying and notifying all persons who have access rights to the Taylor Ranch.

The case is returned to the court of appeals for remand to the trial court. We direct the trial court to identify all landowners who have access rights to the Taylor Ranch and to enter all necessary and appropriate orders to safeguard these rights.

Justice KOURLIS dissents, Justice RICE joins in the dissent.

Justice KOURLIS dissenting:

Jack T. Taylor, Jr. and his successors in interest have been litigating the title to the land at issue in this case for fortythree years, beginning in the federal district court of the district of Colorado. Because I believe that principles of res judicata, finality and certainty of title direct the outcome of this most recent proceeding, I would uphold the findings and conclusions of the trial court as to due process and res judicata. Therefore, I respectfully dissent from the portion of the majority opinion that reopens this controversy and grants rights to landowners who are able to trace their settlement claims[15] to the time of Williams Gilpin's ownership,

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[15] The majority requires that prospective claimants document that they currently own a parcel of land, a portion or all of which was settled during the Gilpin era. Whether or not the occupants of the parcel exercised the rights claimed on Taylor Ranch for the one hundred and fifty years since that time, the majority offers those occupants a legal interest in Taylor

provided that they were not named and served in the 1960's Torrens Title action.

I. Facts and Procedural History

In 1960, Jack T. Taylor, Jr. purchased the mountain tract of the Taylor Ranch estate. Because he knew that there was a cloud on his title arising out of uses historically made of that property by some inhabitants of the area, he sought to clear up any ownership disputes by commencing a Torrens action. He filed the action in the federal district court, on the basis of diversity jurisdiction predicated on his status as a resident of North Carolina. In his application, he named and served 316 defendants individually who he anticipated could have sought to assert a claim against his property. During the course of the Torrens proceedings, he named and served 142 additional defendants at the instigation of the court, based upon testimony of the court-appointed title examiner, who opined that the compilation of named defendants were the only individuals who had a possible interest in the property as landowners of Costilla County.

The federal district court confirmed Taylor's title in an order in 1965, finding that the defendant claimants had no rights of any kind or nature to the estate. Specifically, the court denied the three grounds upon which the claimants attempted to assert their rights. First, the court found that any rights the original settlers asserted under Mexican law did not survive the acquisition of lands by the United States. Second, the court found that the Beaubien document conveyed no rights by express grant or dedication, it did not mention the lands comprising the mountain tract and it did not contain

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Ranch. By bypassing a requirement that the claimant trace his or her title back to an owner during the Gilpin era, I fear that the majority has created a circumstance in which these rights may come as a windfall to individuals who have no history in the area, no tie to people who actually exercised the rights and no legal entitlement.

language of conveyance. Finally, the court found that the claimants had not acquired any rights through their previous uses of the land by prescription or adverse possession, because they could not establish the requisite exclusivity, hostility, or adversity to ownership. Two years later, the Tenth Circuit Court of Appeals approved the court's reasoning and affirmed entry of the Torrens decree.

Taylor acquired additional adjacent lands in 1973, known as the Salazar Estate. The Salazar Estate was the subject of a quiet title action in 1960, and the successful owner recorded his deed and then conveyed his title.

Beginning in 1978, Taylor subdivided portions of the properties and sold off the parcels. Three years later, in 1981, petitioners filed suit in the district court for Costilla County, initially attacking the Torrens decree and attempting to quiet title to the mountain tract. They claimed usufructuary rights in the mountain tract to fish, hunt, recreate, gather firewood, harvest timber and graze cattle and sheep.

On Taylor's motion on the pleadings, the trial court entered judgment denying the claimants' assertion of rights. The court found that because of the prior Torrens proceedings and decree, res judicata and statutes of limitations barred all of petitioners' claims. The court of appeals affirmed and the claimants sought certiorari before this court.

On review before this court in 1994, claimants argued that res judicata did not bar their claims, because they did not receive constitutionally adequate notice of the Torrens action. Specifically, the claimants contended that they were readily ascertainable parties due personal notice of the Torrens proceedings, because their interests were recorded in the Costilla County records, were referenced in both Taylor's deed and the Gilpin agreement, were mentioned in the title examiner's report, and were referred to in Taylor's own application. *Rael v. Taylor*, 876 P.2d 1210, 1227 n. 26

(Colo.1994). This court observed that in a Torrens proceeding, an applicant must personally serve known parties, but may give notice to unknown parties by publication. *Id.* at 1222.

The court determined that the legislature intended to "require applicants to exercise reasonable diligence in ascertaining the names and addresses of persons having any interest in the subject property and therefore required to be listed in the application and personally served." *Id.* at 1227. The court declared that the burden of proving that notice was inadequate rests on the party challenging the Torrens decree. However, the court concluded that because the record was not fully developed, a material fact remained as to whether the claimants would be able to satisfy their burden of showing that Taylor should have known their names and personally served them when he filed his application in 1960. *Id.* at 1222. Thus, this court concluded that the record was inadequate to determine the constitutionality of the notice upon which the Torrens decree was predicated. *Id.* at 1219.

Three justices dissented on the grounds that res judicata did bar the claims and that notice was sufficient. The chief issue on which the majority and dissent disagreed was what a Torrens petitioner was required to do in order to "ascertain the identities of otherwise 'unknown' claimants, that is, claimants whose names or interests do not appear in the record chain of title and who are not in possession of the land." *Id.* at 1231 (J. Vollack, dissenting). The dissenting justices feared that the majority had exaggerated the constitutional requirement, imposing a duty on Torrens applicants "to search for a potential claimant beyond public records or beyond inspecting the land to ascertain who was in possession," in spite of the United States Supreme Court's directions in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S.Ct. 652, 94 L.Ed. 865 (1950) that there is "no requirement of 'impracticable and extended

searches' to locate those beneficiaries whose interests were remote." *Rael*, 876 P.2d at 1234. The dissent cited other Court precedent for the proposition that, "One is not required to undertake 'extraordinary efforts to discover the identity and whereabouts of a [claimant] whose identity is not in the public record.'" *Id.* at 1234 (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 n. 4, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983)). Further, the dissent posited that even if the majority's standard was correct, the determination of whether Taylor exercised reasonable diligence was a question of law for the court, not an issue of fact that required remand to the trial court. *Id.* at 1235.

The majority remanded the case to the trial court for the purpose of determining whether the claimants were readily ascertainable persons who had an interest in the property and who had, thus, been entitled to personal service of notice of the Torrens action. To the extent the plaintiffs were such readily ascertainable persons with an identifiable interest, the majority held that they had been denied due process and, as to them, the Torrens action could not stand.

On remand, the trial court bifurcated the subsequent proceedings, first addressing the notice issues. The plaintiffs claimed an interest in the property as landowners in Costilla County, who were not named and personally served in the 1960 Torrens action, but whose names were readily ascertainable in the records of the Assessor of Costilla County. The defendant claimed that he had exercised reasonable diligence in identifying the persons claiming an interest in his property under the Beaubien document. Specifically, he offered evidence that he obtained an abstract of title that identified all persons who had claimed any interest of record in the property and that he named and served those individuals. Second, he offered evidence that he undertook an inspection of the property and named and served all individuals who were occupying or using the land. The real

issue of contention in this phase of the trial court proceeding was: could Taylor reasonably rely upon the real property records maintained by the Clerk and Recorder of Costilla County for the purpose of identifying individuals with an asserted interest in the property? The trial court agreed with defendant and his real estate experts that such reliance was reasonable and sufficient. Specifically, the court noted that the Assessor's records could serve to provide addresses for otherwise identified individuals, but were in no sense indices of title. The court then found that the claimants were not identified either in Taylor's abstract of title or the real property records, and therefore were only entitled to personal service if they had an identifiable interest in the land by their occupancy of the land. Eliminating all other parties, and refusing to certify a class action, the court found only eight potential claimants who had a readily ascertainable interest and who had not been personally served with notice.

At a later point in time, the court moved to the proceeding on the merits. In that proceeding, the court refused to permit the claimants to assert rights based on prescription, finding that the claimants had added a claim for prescriptive rights at a very late point in the litigation and should therefore not be allowed to pursue it. The court also found that although four of the claimants were barred from asserting rights to the mountain tract because they or their predecessors were named in the Torrens action, those same claimants had corresponding identifiable rights to the Salazar estate and had not been personally named and served in the quiet title action. Another claimant was eliminated because he acquired his property many years after the Torrens action. The court did uphold the rights of two individuals to use roads on the Taylor estate necessary to access their adjudicated water rights. For the remaining parties, the court considered whether the Beaubien document legally or factually established rights of use. The court found that the document did not pertain to the lands of the mountain tract or the Salazar

estate. Further, the court found that the Beaubien document was merely a writing of regulations of the earlier territory, rather than a document of conveyance, hence no rights were ever conveyed. Thus with the exception of access rights for the two individuals with separate water rights, the court dismissed all claims with prejudice.

The court of appeals affirmed and this court granted certiorari again. This court reversed the substantive rulings of the trial court, holding that even though the Beaubien document did not expressly grant any rights, the claimants acquired rights through prescription, estoppel and prior use. I dissented from that conclusion; however, it is now the law of the State and it is from that junction that the present opinions, both the majority and this dissent, flow. Today, the court reverses the trial court's holdings regarding sufficiency of notice. I suggest that, even given the majority's earlier conclusions as to the rights established by the Beaubien document, the trial court's rulings on Taylor's due diligence search and inquiry should stand.

II. The Majority Opinion

I first note an inconsistency between this court's 1994 opinion in *Rael* and the present opinion. The majority here determines, as a matter of law, that all landowners in Costilla County were entitled to notice of the Torrens Action. In *Rael*, the court specifically rejected any such conclusion, and rather carved out a question of fact and returned that question of fact to the trial court. The trial court then reached principled findings, grounded in law and evidence, regarding the identity of the various individuals whose interests were readily ascertainable. The majority court reverses those findings, now holding as a matter of law that all landowners in the County had readily ascertainable interests. If the court had so intended, a remand to the trial court in 1994 would not have been necessary. Accordingly, I read the majority opinion as contravening our earlier opinion in *Rael.*

More particularly, I take issue with the majority's conclusion that, as a matter of law, every individual landowner in Costilla County was a potential holder of implied or adverse rights in the Taylor Ranch. Such a broad-brush determination belies all requirements associated with the acquisition of such rights—which are, necessarily, related to the use a particular claimant may have made of the property. Certainly, an inspection of the tax records of the assessor's office could not have revealed which landowners in the county had gained rights through prescription.

The majority decision does acknowledge, rightfully in my view, that those individuals who recorded an interest, or who were using the property and were therefore personally named and served in the Torrens and quiet title actions are now barred from asserting their interests because of the operation of res judicata. Those individuals were clearly the ones with the most palpable, readily ascertainable interests. Nonetheless, the majority revives the interests of landowners in the county whose rights were so attenuated and ephemeral as to avoid ready identification by Taylor or by the court-appointed title examiner. Many of those individuals to this day remain nameless, unidentified by any party, and yet they may now, thirty years later, finally assert a claim. The simple point is that for these individuals to become legitimate parties to a Torrens action, all they had to do was file a document recording their asserted interest. That is the sanctioned, statutory process in this state designed to protect certainty of title. The individuals here who did so were precluded because they had no legitimate interest, and various courts so held. I suggest that it is unreasonable now to hold that Taylor was required to name and serve every landowner in Costilla County in order to secure title to his property. I also note, in passing, that had he done so, his title would now be secure because none of those individuals could have asserted better rights than the ones who did litigate their claims. Because I conclude that reasonable diligence does not require a

landowner to serve all the parties in a county in case they might at some point have acquired rights by prescription or implication, and because I feel that this decision defeats the purpose of the Torrens Act by rendering Torrens decrees inconclusive, I respectfully dissent.

III. Colorado Real Estate Title Standards

Over fifty years ago, the Colorado Bar Association (CBA) adopted title standards. 2 Cathy Stricklin Krendl, Colorado Methods of Practice § 62.33, at 148 (1998). These standards represent CBA's assessment of the manner in which experienced title examiners in the state of Colorado consider certain issues affecting the marketability of title. *Id.* Specific to our purposes, the title standards set forth the methods that a competent attorney should undertake to investigate marketability of a title so as to be able to issue an opinion to that effect. Krendl, *supra* § 62.33, at 12-13 (Supp.2002). Plaintiffs in this case argue, and the majority agreed, that a reasonable search of the title of Taylor Ranch would have included a search of the tax records of the county. The Colorado Real Estate Title Standards do not assign any such responsibility under any circumstances.

According to section 1.1.2 of the standards, an examining attorney must search "for the recorded documents which affect title to such real property . . . either from a personal examination by the examining attorney of the *real property records* of the county in which such real property is located or from an examination of an abstract of title which purports to contain such recorded documents." Attorneys Title Guar. Fund, Inc., Colorado Real Estate Title Standards 1.1.2 (1997) (emphasis added) (internal citations omitted). Although circumstances may make it necessary for the examiner to inquire further, "more frequently, such matters are excepted from the scope of the examining attorney's title opinion" as outside of such circumstances, generally, "the examining attorney has no obligation to question the accuracy or

completeness of the real property records of the county or the abstract of title." *Id.* at 1.1.5 (Scope of search of matters not of record). When such circumstances arise:

> Those matters outside of the real property records to which title opinions are commonly made subject include rights of parties in possession or occupancy of the real property; matters that may be disclosed by an accurate survey of the real property; statutory mechanics' liens, easements, or claims of easements, not shown by the public records; liens for the payment of taxes. . . .

Id. at 1.1.5.

These materials all relate specifically to the land at issue and to real property in general. They would all contain information as to the specific rights and statutes affecting the title to the property. By contrast, a search of tax records offers no information as to the burdens upon a piece of property, which may have arisen by prescription.

Colorado courts have recognized that "[d]ocuments outside the chain of title provide no notice unless a possible irregularity appears in the record which indicates the existence of some outside interest by which the title may be affected." *Collins v. Scott*, 943 P.2d 20, 22 (Colo.App. 1996). Constructive notice is given when a document is recorded "in the office of the appropriate clerk and recorder." *Id.* However, Colorado courts have declined "to extend the presumption of constructive notice to information contained in" outside materials such as trade name affidavits. *Nile Valley Fed. S & L v. Sec. Title Guar. Corp.*, 813 P.2d 849, 852 (Colo.App.1991).

The Beaubien document was outside the chain of title and had never been recorded in the title so as to create a cloud on the Taylor title. Even if we assume that Taylor had a duty of inquiry notice arising out of that document, the duties attendant upon inquiry notice have never included those now

prescribed by the majority. This court suggested in *Bray v. Germain Inv. Co.*, 105 Colo. 403, 98 P.2d 993, 995 (1940) that publication notice is not sufficient when an examiner may, by the exercise of reasonable diligence, "discover the identity of a party interested in the res." However, the court in that case considered the rights of individuals whose identities and addresses were made known to the publishing party by the interested party's attorneys, prior to the publication. *Id.* at 994. The court noted that until their identities were made known, "reasonable diligence was exercised" and publication notice would have sufficed. *Id.* at 995.

The Federal District Court in 1965 reviewed the sufficiency of notice in the Torrens action, requiring Taylor to name and serve a number of additional parties. That determination was upheld. Again, a trial court has reviewed in detail what Taylor did, what he knew or should have known at the time, and has upheld the procedure he undertook, except as to a few claimants. This issue has been fully resolved, in accordance with prevailing law and title examination requirements. It should be allowed some postponed finality.

IV. Torrens Title Registration: the Purpose and Procedure

Title searches are necessitated by the land title recording system used in almost every state today. The recording system traces its roots back to the earliest conveyances of real property during the colonial period. This system makes no promises to reward a diligent search, but merely invites the purchaser to inspect an index organized by the names of those parties who have recorded their interest in real estate and allows the searcher to gamble on that basis as to the certainty of his title. Roger A. Cunningham et al., The Law of Property § 11.15, at 827 (1984).

In contrast, the Torrens system of registration of title was designed to convey absolute certainty of title. Developed in 1858 by Sir Robert Torrens, the system differs from land title recording systems both in nature and result. 14 Richard R. Powell, Powell on Real Property § 83.01[2] (rev. ed.1999). Tangibly, under a recording system, the records maintained merely include evidence of the instruments of conveyance by which a title was transferred. However, under the registration system, what is registered is the actual title to the land. 42 A.L.R.2d 1388 § 1 (1955). After the title is registered, a transfer of title may only take place when the owner voluntarily submits his copy of the registration to the registrar, who then issues a new certificate. *Id.*

Academics bemoan the uncertainty of title conveyed under the recording system, and champion the Torrens system as offering a sensible modem solution to many problems. Calls for conveyancing reform focus on three major areas of concern: 1) inadequate security for land titles, 2) speed in determination of title status, and 3) cost of assuring title. John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 347-48 (3rd ed.1989). All of these concerns are readily answered by a registration system.

The purpose of Torrens registration is to "make the title to property more certain and readily ascertainable [to] third parties." Powell, *supra*, § 83.02[1]. Unlike the traditional recording system, under a registration system it is not necessary for purchasers "to search, examine and analyze the evidence of title." *Id.* The purchaser can readily find the exact status of the title. *Id.* "No historical search of the title is ever necessary or relevant." Cunningham, *supra*, § 11.15, at 829. "The title examination process is vastly simplified and duplication of searches as successive transfers of the same land occur is eliminated." *Id.* Further, it is efficient and cost effective-in most cases a competent attorney can verify a registered title in about an hour. Cribbet, *supra*, at 351.

Most importantly, title registration affords maximum security of title. *Id.* at 352. "So long as the owner takes proper care of his *duplicate,* it is an absolute safeguard against loss of-title by reason of a forged deed." R.G. Patton, *Priorities, Recording, Registration, in* 4 American Law of Property 521, § 17.41 (A. James Casner ed., 1952). The conclusiveness of the title is "of vital interest to the holder, to mortgagees who loan him money, and to anyone who is about to purchase the title from him." *Id.* at § 17.47.

The purpose of Torrens registration systems is thus accurately characterized as follows:

> The objects of the [Torrens] system are as follows: First, the creation of an indefeasible title in the registered owner; second, simplification in the transfer of land; third, certainty and facility in the proof of title by reference to a certificate issued by a government official made conclusive by law; and fourth, the saving to the community of the cost of a new examination of title in connection with each transfer or transaction affecting the land.

State ex rel. Draper v. Wilder, 145 Ohio St. 447, 62 N.E.2d 156, 158 (1945) (quoting 8 Thompson on Real Property, Perm. Ed., 258, § 4415).

Registration statutes are voluntary rather than mandatory, and current owners have little motivation to undergo the expense of guaranteeing their title via registration unless the courts then uphold such registration decrees. It is easy to appreciate that the degree of effectiveness of title registration depends fundamentally upon "the degree to which a *certificate of title* . . . is conclusive and able to withstand challenge as to the ownership of a specific parcel of real estate." Powell, *supra*, § 83.02[3][a].

V. The Colorado Torrens Act

Colorado has adopted a system of voluntary registration under the Torrens Registration Act. When a court enters a decree of registration, that decree binds the land and quiets the title thereto, and is "forever binding and conclusive upon all persons." § 38-36-130, 5 C.R.S. (2002). The registration decree may not be attacked unless an individual holding an interest in or lien upon the land, who was not actually served with process or *notified* of the application filing, and who in fact had no *actual notice or information* of the filing, petitions to reopen the registration within 90 days of its entry and before an innocent purchaser for value has acquired an interest. § 38-36-131. All other complaints against the decree must be pursued as actions in tort or indemnity. *Id.*

Thus after 90 days, no person may attempt to recover any interest in registered land. § 38-36-132. The recipient of the registration decree and subsequent purchasers may rest confident in their absolute title. No adverse party may ever attack the estate; the property is protected even against adverse possession. § 3-36-137 ("No title to registered land in derogation of that of the registered owner shall ever be acquired by prescription or adverse possession."). The decree is an agreement forever running with the land, and all dealings with the land are controlled by the statutes of the registration act, unless the owner formally removes the land from registration. § 38-36-136.

VI. Relevant Case Law

This court has long upheld the validity of Torrens registration decrees against attack. As early as *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 P. 949 (1907), this court upheld the constitutional validity of Torrens decrees against complaints of due process violation. A short time later, this court protected a creditor's reliance on a Torrens decree against a subsequent possessor of the property with a valid

recorded interest. *Sterling Nat'l Bank v. Fischer*, 75 Colo. 371, 226 P. 146 (1924). The court observed, "the purpose of the [Torrens] act was to escape from the old rules governing the transfer of real estate." *Id.* at 147.

Other states have recognized the important role Torrens registration plays in solidifying title to real property. Comparing registration to recording, the Supreme Court of Minnesota observed that under a recording system:

> [P]rospective purchasers of real property must examine the recorded evidence of transfers and encumbrances. With the passage of time and the inevitable lengthening of chains of title, this process understandably becomes more cumbersome and uncertain. Every time title to real property changes hands, the number of documents in a chain of title increases and the encumbrances that may constitute a defect in title increase in direct proportion. Thus, many title examiners feel compelled to raise any and all possible defects, even those that may be considered de minimus, when ascertaining whether title is marketable. As a result, examination of titles becomes less efficient and the status of titles becomes less certain.

Hersh Props., LLC v. McDonald's Corp., 588 N.W.2d 728, 732-33 (Minn.1999) (citing Paul E. Basye, *Trends and Progress-The Marketable Title Acts*, 47 Iowa L.Rev. 261, 261 (1962)). Comparatively, the court recognized that Minnesota's registration system "operates to vest conclusive title in the holder of a certificate of title issued pursuant to judicial proceedings." *Id.* at 733. It is the "conclusive nature of certificates of title [which] allows real property owners to rely on the certificate of title while disregarding most interests not evidenced on the current certificate of title." *Id.* at 734.

Similarly, in Massachusetts, the Supreme Court recognized that Torrens systems are "deemed advantageous since '[t]he difficulty with the [recording] system is that no one can be absolutely certain whether he is buying a good title or a bad

one. . . . The great purpose of the Torrens System is to rid land titles of this peril, for with its disappearance disappears all the expense, trouble and delay that attend running the title back through previous transfers.'" *Kozdras v. Land/Vest Props., Inc.*, 382 Mass. 34, 413 N.E.2d 1105, 1111 (1980) (quoting Hurd, *Exposition of the Torrens System of Registration of Title, in* The Torrens System of Registration and Transfer of the Title to Real Estate 88-89 (Yeakle ed. 1894)).

The Supreme Court of North Carolina thus accurately concluded that the just purpose of the Torrens system is:

> to secure by a decree of court, or other similar proceedings, a title impregnable against attack; to make a permanent and complete record of the exact status of the title with the certificate of registration showing at a glance all liens, encumbrances, and claims against the title; and to protect the registered owner against all claims or demands not noted on the book for the registration of titles.

State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971) (quoting Frederick B. McCall, The Torrens System-After Thirty-Five Years, 10 N.C. L.Rev. 329 (1932)).

Of course, Colorado's Torrens Registration Act must comply with the due process requirements of the United States Constitution. Specifically, the Torrens system may not deprive any individual of his interest in land without providing him due notice of the registration proceedings, that he may appear to assert his rights.[16]

Under *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), due process

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[16] I do not find *Jacobucci v. Dist. Court*, 189 Colo. 380, 541 P.2d 667 (1975) instructive on this issue. In *Jacobucci*, this court ruled as a matter of law that readily ascertainable possessors of water rights could not collectively be served notice through a mutual ditch company, which itself had no actual ownership rights in or rights to use the water.

requires that any interested parties must be given notice of the proceedings that is reasonably calculated, under the circumstances, to apprise them of the action and give them an opportunity to present their objections. *Id.* at 314, 70 S.Ct. 652. While a mere gesture toward supplying notice is insufficient, personal service is not always required. *Id.* at 314-15, 70 S.Ct. 652.

The focus is whether the means adopted by the petitioner are those that a reasonable person who truly desires to reach any absent parties would use to do so. *Id.* at 315, 70 S.Ct. 652. Thus the notice must "reasonably convey the required information" and afford a reasonable time for parties to appear. *Id.* at 314, 70 S.Ct. 652. Always the "practicalities and peculiarities of the case" weigh into the consideration of the appropriateness of the notice. *Id.* A state *may* dispense with certain notice to beneficiaries "whose interests or whereabouts could not with due diligence be ascertained," "whose interests are either conjectural or future," or who "do not in the due course of business come to knowledge" even when they could be discovered upon investigation. *Id.* at 317, 70 S.Ct. 652.

While the Court noted in *Mullane* that, where the names and post office addresses of affected parties are "at hand," notice by mail is required, the court was not referring to any and all parties who may be unearthed through investigation. *Id.* at 318-19, 70 S.Ct. 652. Rather the court referenced those parties whose identities, as in that case, were "on [the] books" of the petitioning party himself and thus gave him ready actual knowledge of the parties' in interest identities and whereabouts. *Id.* at 318, 70 S.Ct. 652.

Importantly, of course, I repeat the statutory mandate that any attack on the Torrens decree under Colorado law must be initiated within 90 days of entry of the decree. All other remedies are damages remedies. Hence, even if the Torrens

decree here is in some way defective, the claimants' only remedy is money damages, and not rights to the property.

VII. Application

Jack Taylor, and the title examiner appointed to examine the interests of competing parties in the 1960 Torrens action, exercised due diligence to identify and notify all reasonably ascertainable parties of the Torrens proceedings. Following standard Colorado procedures, they examined the title to the estate, tracing the record of title through the real estate records of the clerk and recorder's office and inspecting the land for unidentified occupants. In addition, the examiner made requests of two parties claiming to represent further unidentified individuals with interests. Finally, Taylor fenced in the property to give actual notice to any parties attempting to use the property, and published notice in the county newspaper for six weeks. These methods exceeded the necessary procedures and served to support the entry of a valid Torrens decree. Subsequent purchasers were entitled to rely upon the certificate of registration to protect their acquisition of the estates. Alternatively, any errors justifying relief must, according to statute, be brought as actions for damages, as title to the land indisputably rests in the hands of those in whom title was quieted by the Torrens decree or purchasers who relied upon that decree.

IX. Costs

I find no basis for assessment of prospective costs against Taylor under C.R.C.P. 54(d). "Costs" under the Rule reflect expenditures already made by a prevailing party, not expenditures occasioned by a remand order. The discretion to award future costs is committed to the trial court. Taylor and his successors in interest have made every effort to follow statutory and court-ordered procedures, presumably at great expense. Now to be ordered to pay costs of serving unidentified and uncounted claimants operates as an unwarranted

sanction. Lastly, it is the plaintiffs who seek to quiet title as against a registered Torrens decree. Irrespective of the legal merit of their claims, they continue to bear the burden of going forward should they so choose. Taylor is the defendant here.

IX. Conclusion

This case has had a tortuous history, of almost Dickensian proportion. Yet, despite the convoluted procedural background, clear rules of law apply and those clear rules operate to preclude these claimants from asserting any interest in the Taylor Ranch property. Counterbalanced against those clear rules of law are individuals who represent part of the history and heart of Colorado. However, acceding to their claims is truly a departure from settled principles of property law, finality of judgment, and certainty of title. I respectfully dissent, and would affirm the trial court's rulings regarding the sufficiency of notice and operation of res judicata.

I am authorized to state that JUSTICE RICE joins in this dissent.

APPENDIX B

SUPREME COURT OF COLORADO
EN BANC

No. 00SC527

EUGENE LOBATO; Zack Bernal; Gabrielita Adeline Espinosa; Edward Espinosa; Pete E. Espinosa, Jr.; Corpus Gallegos, by and through his conservator Yvette Gallegos; Gloria Gallegos; Rupert Gallegos; Raymond Garcia; Charlie Jacquez, Jr.; Adolph J. Lobato; Bonifacio "Bonnie" Lobato, by and through his conservator Teresa Lobato; Carlos Lobato; Emilio Lobato, Jr.; Jose F. Lobato; Presesentacion J. Lobato; Gloria Maestas; Norman Maestas; Robert "Bobby" Maestas; Raymond J. Maestas; Eugene Martinez; Mark Martinez; Agatha Medina; Gilbert "Andres" Montoya; Shirley Romero Otero; Eppie Quintana; Lucille Samelko; Arnold Valdez; Ervin L. Vigil; Larry J. Vigil; Michael J. Vigil; Billy Alire; Robert Atencio; Frances D. Berggran-Buhrles; Jose Fred Carson; Elmer Manuel Espinosa; Margurito Espinosa; Moises Gallegos; Ruben Gallegos; Richard J. Garcia; Manuel Gardunio; Ruben Herrara; Jeffrey Jacquez; Adelmo Kaber; Crucito Maes; Daniel Martinez; David Martinez; Jesse Martinez; Leonardo Martinez; Rosendo Martinez; Solestiano Martinez; Alfonso Medina; Gilbert Medina; Leandardo Medina; Loyola Medina; Marvin Medina; Orry Medina; Raymond N. Medina; Rudy Montoya; Gurtrude C. Olivas; Eppy Wayne Quintana; Robert Romero; Shirley Romero; Anthony Sanchez; Bonnie Sanchez; Eugene Sanchez; Evan Sanchez; James Sanchez; Jose G. Sanchez; Rufino Sanchez; S.R. Sanchez; Vernon Sanchez; Ronald A. Sandoval; Elesam Santistevan; Daniel Segura; Floyd R. Solan; Carolyn Taylor; Sam Valdez; Martha Vialpondo; Joe P. Vigil; and Walter Vigil,

Petitioners,

v.

ZACHARY TAYLOR, as executor of the Estate of Jack T. Taylor, Jr., deceased; The Taylor Family Partnership; J. Hoy Anderson; Marvin Lavern Stohs; Edythe Kelly Stohs; Charles W. Gelderman; William F. Phinney; Harlan A. Brown; Dena F. Fuhrmann; Jimmy C. Crook; Freeland D. Crumley; Joseph P. Campisi; Hugh R. Denton; Robert Paul Resteli; Eugene J. Kafka; Avis M. Anderson; Clifford R. Jenson; Don W. Jacobs; Raymond E. Gauthier; Francis P. Heston; and Howard G. Frailey,

Respondents.

June 24, 2002

Chief Justice MULLARKEY delivered the Opinion of the Court.

The history of this property rights controversy began before Colorado's statehood, at a time when southern Colorado was part of Mexico; at a time when all of the parties' lands were part of the one million acre Sangre de Cristo grant, an 1844 Mexican land grant. Here, we determine access rights of the owners of farmlands in Costilla County to a mountainous parcel of land now known as the Taylor Ranch. As successors in title to the original settlers in the region, the landowners exercised rights to enter and use the Taylor Ranch property for over one hundred years until Jack Taylor fenced the land in 1960 and forcibly excluded them. These rights, they assert, derive from Mexican law, prescription, and an express or implied grant, and were impermissibly denied when the mountain land was fenced.

We are reviewing this case for the second time in this protracted twenty-one year litigation. In the first phase of this litigation, the trial court dismissed the plaintiffs' claims, holding that a federal decision in the 1960s on the same issue

barred their suit. We reversed and remanded, holding that the notice given in the federal case did not comport with due process. The subject matter of the current appeal is the landowners' substantive claims of rights. The trial court and the court of appeals held that the landowners failed to prove rights on any of their three theories.

We find that evidence of traditional settlement practices, repeated references to settlement rights in documents associated with the Sangre de Cristo grant, the one hundred year history of the landowners' use of the Taylor Ranch, and other evidence of necessity, reliance, and intention support a finding of implied rights in this case. While we reject the landowners' claims for hunting, fishing, and recreation rights, we find that the landowners have rights of access for grazing, firewood, and timber through a prescriptive easement, an easement by estoppel, and an easement from prior use. Furthermore, we retain jurisdiction in order to examine the trial court's due process determination.

I. Facts and Prior Proceedings

In 1844, the governor of New Mexico granted two Mexican nationals a one million-acre land grant, located mainly in present-day southern Colorado (Sangre de Cristo grant), for the purpose of settlement. The original grantees died during the war between the United States and Mexico. The land was not settled in earnest until after the cessation of the war, and Charles (Carlos) Beaubien then owned the grant.

In 1848, the United States and Mexico entered into the Treaty of Guadalupe Hidalgo, ending the war between the two countries. Treaty of Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), February 2, 1848, U.S.-Mex., 9 Stat. 922. Pursuant to the treaty, Mexico ceded land to the United States, including all of California, Nevada, and Utah; most of New Mexico and Arizona; and a portion of Colorado. The United States agreed to honor the existing

property rights in the ceded territory. Relevant to the Sangre de Cristo grant, Congress asked the Surveyor General of the Territory of New Mexico to determine what property rights existed at the time of the treaty. On the Surveyor General's recommendation, Congress confirmed Carlos Beaubien's claim to the Sangre de Cristo grant in the 1860 Act of Confirmation. 12 Stat. 71 (1860).

In the early 1850s, Beaubien successfully recruited farm families to settle the Colorado portion of the Sangre de Cristo grant. He leased a portion of his land to the United States government to be used to establish Fort Massachusetts and recruited farmers to settle other areas. The settlement system he employed was common to Spain and Mexico: strips of arable land called vara strips were allotted to families for farming, and areas not open for cultivation were available for common use. These common areas were used for grazing and recreation and as a source for timber, firewood, fish, and game.

In 1863, Beaubien gave established settlers deeds to their vara strips. That same year, Beaubien executed and recorded a Spanish language document that purports to grant rights of access to common lands to settlers on the Sangre de Cristo grant (Beaubien Document). In relevant part, this document guarantees that "all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another."

A year later, Beaubien died. Pursuant to a prior oral agreement, his heirs sold his interest in the Sangre de Cristo grant to William Gilpin, who was Colorado's first territorial governor. The sales agreement (Gilpin agreement) stated that Gilpin agreed to provide vara strip deeds to settlers who had not yet received them. The agreement further stated that Gilpin took the land on condition that certain "settlement

rights before then conceded . . . to the residents of the settlements . . . shall be confirmed by said William Gilpin as made by him."

In 1960, Jack Taylor, a North Carolina lumberman, purchased roughly 77,000 acres of the Sangre de Cristo grant (mountain tract) from a successor in interest to William Gilpin. Taylor's deed indicated that he took the land subject to "claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlement rights in, to, and upon said land."

Despite the language in Taylor's deed, he denied the local landowners access to his land and began to fence the property. Taylor then filed a Torrens title action in the United States District Court for the District of Colorado to perfect his title (Torrens action).[1] *Taylor v. Jaquez*, No. 6904 (D.Colo. Oct. 5, 1965). The district court found that the local landowners did not have any rights to the mountain tract; the Tenth Circuit Court of Appeals affirmed. *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir.1967).

In 1973, Taylor purchased an adjoining, roughly 2,500 acre parcel that was also part of the Sangre de Cristo grant (Salazar estate). Taylor's predecessor in title to the Salazar estate had also filed a Torrens title action in 1960 which determined that local landowners had no rights in the estate. Together, the mountain tract and the Salazar estate are known as the Taylor Ranch.

The current case began in 1981. In that year a number of local landowners filed suit in Costilla County District Court.

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[1] The Colorado Torrens Title Registration Act allowed land owners to file an action that would essentially quiet title to their land. §§ 118-10-1 to -102, 5 C.R.S. (1952)(now codified at §§ 38-36-101 to -199)(for a full discussion of the Torrens Title Registration Act, *see Rael v. Taylor*, 876 P.2d 1210, 1219-23 (Colo.1994)). Because Taylor was a North Carolina resident he invoked diversity jurisdiction.

The landowners asserted that they had settlement rights to the Taylor Ranch and that Taylor had impermissibly denied those rights.[2] The court held that the doctrine of res judicata barred the suit because the Salazar Torrens action and the *Sanchez* decision regarding Taylor's Torrens action were binding upon the plaintiffs. *Rael v. Taylor*, No. 81CV5 (Costilla Co. Dist. Ct. Sept. 22, 1986) (Judgment for Defendant on Motion for Judgment on the Pleadings or for Summary Judgment).

The court of appeals affirmed. *Rael v. Taylor*, 832 P.2d 1011, 1014 (Colo.App.1991). This court granted certiorari and reversed and remanded, questioning the constitutional adequacy of the publication notice in the Torrens action. *Rael v. Taylor*, 876 P.2d 1210, 1228 (Colo.1994). We directed the trial court to determine which of the plaintiffs received adequate notice in the Torrens action and to hold a trial on the merits for those who did not have proper notice. *Id.*

On remand, the trial court granted Taylor's motion for summary judgment on the Mexican law claim. The court then bifurcated the proceedings: it determined the due process and class action certification issues before holding a trial on the merits. During the due process phase, the court dismissed most of the plaintiffs. The court determined that seven of the plaintiffs could pursue their claims regarding the mountain tract and that three of the plaintiffs could proceed with their claims regarding the Salazar estate.[3] Without further hearing,

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[2] Jack Taylor died during the pendency of this litigation. His son, Zachary Taylor, stepped in as the executor of his father's estate. At some point, the Taylor estate sold the Taylor Ranch to another party. This party bought the land subject to the landowners' claims and subject to this litigation. For the sake of simplicity, Jack Taylor and his successors in title are referred to as "Taylor" in this opinion.

[3] Taylor claims that the Salazar estate is no longer at issue in this case because our opinion in *Rael* did not expressly discuss this property. We find that the Salazar estate is still at issue. The trial court, on remand from *Rael*, continued to make findings of fact regarding the Salazar estate. To

the court denied class certification. The court then held a trial on the merits.

After the trial, the court made a finding of fact that the landowners or their predecessors in title had "grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted and recreated on the land of the defendant from the 1800s to the date the land was acquired by the defendant, in 1960." The trial court further found that the community referred to Taylor Ranch as "open range," and that prior to 1960, the landowners "were never denied access to the land." The court also stated that it did "not dispute" that the settlers could not have survived without use of the mountain area of the g ant.

Despite theses findings, the court determined that the landowners had not proved prescriptive rights because their use was not adverse. The court further held that the Beaubien Document was not an effective express grant of rights because it did not identify the parties to the rights or the locations where the rights should be exercised. Regarding an implied grant by Beaubien, the court concluded that Colorado law did not recognize the implied rights the landowners claimed. The landowners appealed both the due process determination and the rulings on their claim of rights.

The court of appeals affirmed. *Lobato v. Taylor*, 13 P.3d 821 (Colo.App.2000). The court agreed with the trial court's conclusions regarding all three of the landowners' theories. Regarding an express grant of rights, the court of appeals engaged in a technical application of the 1863 property laws of the Colorado Territory. *Id.* at 831. The court concluded that the document included neither the "christian and surnames" of the grantees nor an accurate description of the property to be burdened. *Id.* Furthermore, the court of appeals

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the extent that *Rael* did not specifically address that portion of the Taylor Ranch, it was an oversight.

noted that that because the document does not use the words, "and heirs and assigns" it does not indicate that Beaubien intended any rights to run with the land. *Id.* Because the court rejected all of the landowners' substantive claims, the court did not reach the question of whether the trial court erred in its due process decision.

We granted certiorari.

II. Analysis

The landowners claim rights to graze livestock, gather firewood and timber, hunt, fish, and recreate. Before discussing the sources of the settlement rights, we characterize the claimed rights in order to determine the rules of law that govern them.

A. The Rights at Issue

The parties, at various points in the voluminous briefing of this twenty-one year-old litigation, agree that the rights at issue are most appropriately characterized as profits à prendre. A profit à prendre—in modern parlance, a profit—"is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another." Restatement (Third) of Property: Servitudes § 1.2(2)(1998) [hereinafter Restatement]. Thus, a profit is a type of easement.

This court has described an easement as "a right conferred by grant, prescription or necessity authorizing one to do or maintain something on the land of another which, although a benefit to the land of the former, may be a burden on the land of the latter." *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo.1998)(quotation marks omitted).

An easement can be in gross or appurtenant. An easement in gross does not belong to an individual by virtue of her ownership of land, but rather is a personal right to use another's property. *Lewitz v. Porath Family Trust*, 36 P.3d

120, 122 (Colo.App.2001). An easement appurtenant, on the other hand, runs with the land. It is meant to benefit the property, or an owner by virtue of her property ownership. *See Lazy Dog*, 965 P.2d at 1234. An easement is presumed to be appurtenant, rather than in gross. *Lewitz*, 36 P.3d at 122; Restatement, *supra*, § 4.5(2).

In this case, the landowners allege that the settlement rights were to be used in connection with their land. They argue that the firewood was used to heat their homes, the timber to frame their adobe houses, and the grazing necessary to the viability of their farms. The landowners also assert that the settlement rights were granted to their predecessors in title by virtue of their interest in their vara strips and were in fact a necessary incentive for settlement in the area.

We conclude that the rights the landowners are claiming are best characterized as easements appurtenant to the land. We reach this conclusion from the evidence that under Mexican custom access to common land was given to surrounding landowners, the evidence that this access was used to benefit the use of the land, and the presumption in favor of appurtenant easements.

Having established the nature of the rights at issue, we now turn to the sources of these rights.

B. Sources of the Rights

The landowners argue that their settlement rights stem from three sources: Mexican law, prescription, and an express or implied grant from Beaubien.

Regarding the Mexican law claim, the landowners claim that community rights to common lands not only are recognized by Mexican law, but also are integral to the settlement of an area. The landowners further point out that in the Treaty of Guadalupe Hidalgo, the United States government agreed that the land rights of the residents of the ceded territories would be "inviolably respected." Under the

landowners' theory, the treaty dictates that the court apply Mexican law to the Taylor Ranch and accordingly recognize the settlement rights.

The landowners further argue that use rights can be found via prescription. For this claim, they point to their regular use of the Taylor Ranch land for over one hundred years until the area was fenced in 1960.

Lastly, the landowners assert that their use rights were obtained by either an express or implied grant from Carlos Beaubien. For this claim, the landowners rely primarily on the Beaubien Document.

The trial court dismissed the Mexican law claim on motion for summary judgment, and after a trial on the merits, rejected the two remaining claims. The court of appeals affirmed. The court of appeals held that the Mexican law claim failed because whatever rights may have existed at the time of the Treaty of Guadalupe Hidalgo were subsequently extinguished by Congress's 1860 Act of Confirmation. *Lobato*, 13 P.3d at 829. The court further held that the landowners could not claim prescriptive rights because their use of the Taylor Ranch was not adverse. *Id.* at 834-35. Lastly, the court held that the Beaubien Document fails as an express grant of rights and that Colorado does not recognize implied easements in the form of profits. *Id.* at 832-33.

We agree that the landowners cannot claim rights under Mexican law. Their predecessors in title did not settle on the Sangre de Cristo grant until after the land was ceded to the United States[4] and thus their use rights developed under

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[4] It is evident from the record that permanent settlement of the Sangre de Cristo grant did not begin until after 1848. Although some settlement was attempted prior to the Treaty of Guadalupe Hidalgo, those settlers did not succeed, due, in part, to Indian hostilities and aggression between the United States and Mexico. The plaintiffs, in their second amended complaint, admit that "[t]he erection of Fort Massachusetts in 1852 . . .

United States law. Mexican land use and property law are highly relevant in this case in ascertaining the intentions of the parties involved, see *infra.* However, because the settlement of the grant occurred after the land was ceded to the United States, we conclude that Mexican law cannot be a source of the landowners' claims.

We disagree, however, with the court of appeals' resolution of the landowners' other claims. While the Beaubien Document cannot support an express grant of rights, when coupled with the Gilpin agreement and other evidence, it supports a finding of a prescriptive easement, an easement by estoppel, and an easement from prior use.

1. The Beaubien Document

As evidence of a grant of rights from Carlos Beaubien, the landowners rely primarily on the Beaubien Document. The document was written by Beaubien in 1863, one year before his death.

One English translation of the document reads, in part:

> Plaza of San Luis de la Culebra, May 11, 1863.
>
> It has been decided that the lands of the Rito Seco remain uncultivated for the benefit of the community members (gente) of the plazas of San Luis, San Pablo and Los Ballejos and for the other inhabitants of these plazas for pasturing cattle by the payment of a fee per head, etc. and that the water of the said Rito remains partitioned among the inhabitants of the same plaza of San Luis and those from the other side of the vega who hold lands almost adjacent to it as their own lands, that are not irrigated with the waters of the Rio Culebra. The

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marked the start of the settlement of the area in earnest" and that the permanent settlements were established as follows: "Costilla and Garcia in 1849; San Acacio and San Luis in 1850; San Pablo in 1852; San Francisco and La Valle in 1854; and Chama in 1855."

> vega, after the measurement of three acres from it in front of the chapel, to which they have been donated, will remain for the benefit of the inhabitants of this plaza and those of the Culebra as far as above the plaza of Los Ballejos. . . . Those below the road as far as the narrows will have the right to enjoy the same benefit. . . . *[No one may] place any obstacle or obstruction to anyone in the enjoyment of his legitimate rights* . . . . Likewise, each one should take scrupulous care in the use of water without causing damage with it to his neighbors nor to anyone. According to the corresponding rule, *all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another.*

(Emphases added.)

The landowners assert that this document evidences an express grant of settlement rights on the Taylor Ranch land. The trial court concluded that the Beaubien Document did not vest any rights in the Taylor Ranch. The court noted that although the document lists rights of pasture, water, firewood, and timber, the only locations specified for access are the Rito Seco and the vega, two areas that the parties agree are not part of the Taylor Ranch. The trial court did admit extrinsic evidence to determine whether there was a "latent ambiguity" in the document. However, because the court ultimately found that the document was unambiguous, it ruled that extrinsic evidence could not be considered in interpreting the document.

The court of appeals affirmed. *Lobato*, 13 P.3d 821. The appeals court agreed that the Beaubien Document was ultimately unambiguous and that the trial court properly treated the extrinsic evidence of Beaubien's intent. *Id.* at 832. The court then applied 1863 Colorado property law and concluded that the Beaubien Document did not meet the formal requirements for conveying rights to the landowners'

predecessors in title. *Lobato*, 13 P.3d at 831. Moreover, the court held that profits must be expressly granted and thus rejected any claim of implied rights. *Id.* at 832-33.

We agree that the Beaubien Document does not meet the formal requirements for an express grant of rights. However, we find that the document, when taken together with the other unique facts of this case, establishes a prescriptive easement, an easement by estoppel, and an easement from prior use.

Extrinsic evidence is relevant in interpreting the Beaubien Document. In *Lazy Dog*, we articulated when a court could examine extrinsic evidence in order to ascertain the nature of an easement. In that case, we expressly followed the Restatement and concluded that "[o]ur paramount concern in construing a deed is to ascertain the intentions of the parties." *Lazy Dog*, 965 P.2d at 1235. We also recognized that "circumstances surrounding the grant may be relevant to interpreting the language of the grant." *Id.* at 1236; *see also* Restatement, *supra,* § 4.1(1)(noting that an easement "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created"). Moreover, the question of whether or not the document is ambiguous "may be answered by reference to extrinsic evidence." *Lazy Dog*, 965 P.2d at 1235.

Here, we look to extrinsic evidence to construe the Beaubien Document for two reasons. First, as *Lazy Dog* tells us, extrinsic evidence may reveal ambiguities. Second, the document is ambiguous on its face with respect to where the landowners could exercise their rights.

Lazy Dog tells us that extrinsic evidence may reveal ambiguities in modern documents; that principle can be only more true with respect to the Beaubien Document. We are attempting to construe a 150 year-old document written in

Spanish by a French Canadian who obtained a conditional grant to an enormous land area under Mexican law and perfected it under American law. Beaubien wrote this document when he was near the end of his adventurous life in an apparent attempt to memorialize commitments he had made to induce families to move hundreds of miles to make homes in the wilderness. It would be the height of arrogance and nothing but a legal fiction for us to claim that we can interpret this document without putting it in its historical context.

For the most part, the document is reasonably specific in identifying places where rights are to be exercised.[5] That is not true with respect to the rights asserted by the landowners. The key language reads: "According to the corresponding rule, all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another."

Thus, given the specificity of other parts of the document, the lack of specificity in this sentence creates an ambiguity. We cannot determine from the face of the document what lands were burdened by the rights Beaubien conveyed to the first settlers.

Following *Lazy Dog*, we look to the extrinsic evidence in this case. Amici assert that the contrast between the specificity of the majority of the Beaubien Document and the casual reference to the settlement rights at the end of the document can best be explained by the events surrounding the execution of the document. Beaubien penned the document at a time when settlement was moving to the northern area of the grant, which lies northwest of the Taylor Ranch area. At that time, he wrote the Beaubien Document to establish

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[5] The locations referenced in the beginning portion of the document all refer to areas in and around the present day town of San Luis. For example, the document explains that the vega is three acres in front of the chapel that still exists in the town of San Luis.

common rights to the area in and around San Luis and at the same time memorialize settlement rights that had already been in existence in the more southern areas of the grant, where Taylor Ranch is located.

We agree with the amici. From the trial court findings, expert testimony, the documents associated with the grant, and a review of the settlement system under which Beaubien and the settlers were operating, we draw two conclusions. First, we conclude that the location for the settlement rights referenced in the Beaubien Document is the mountainous area of the grant on which Taylor Ranch is located. Second, we conclude that Beaubien meant to grant permanent access rights that run with the land.

We first discuss the location for the rights. The evidence in this case establishes that the reference to pasture, water, firewood, and timber in the Beaubien Document refers to access on the mountain area of the grant of which Taylor Ranch is a part.

First, the trial court found that the landowners or their predecessors in title accessed the Taylor Ranch land for over one hundred years to exercise the rights outlined in the Beaubien Document. This strongly suggests that the parties understood that the Taylor Ranch land was the location of their access rights.

Second, experts testified that the resources listed in the document were only available in the Taylor Ranch area of the grant. Expert testimony established that summer grazing, wood, and timber were only available in the mountain area of

the grant.[6] This is perhaps the most significant evidence that points to the Taylor Ranch as the location of the rights.

Third, the landowners' access rights are expressly mentioned in Taylor's deed. The deed subjects his property interest not only to "rights of way of record," but also to "all rights of way heretofore located and now maintained and used on, through, over, and across the same." It further subjects the conveyance to "claims of the local people by prescription or otherwise to rights to *pasturage, wood, and lumber and so-called settlement rights* in, to, and upon said land." (Emphasis added.) This resolves any doubt that the access rights were meant to burden Taylor's land.

There is also ample evidence that the document was meant to create permanent rights that run with the land. Both the settlement system under which Beaubien and the settlers were operating and the Gilpin agreement are strong evidence of this.

Access to common areas was an integral feature of the settlement system under which the settlers and Beaubien were operating. Under Spanish and Mexican law, the government awarded community and private grants for the purpose of settling the frontier. *See* Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico* 23 (1994).

The Mexican grants were issued under specific procedures. The governor would refer a petition to the local *alcalde* (mayor) for his recommendations on whether the grant should

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[6] Of Taylor's 80,000 acres, a 77,000 acre area has historically been called La Sierra or the Mountain Tract. The Taylor Ranch is situated on the eastern most part of the grant. The eastern boundary of the Sangre de Cristo grant is along the peaks of the Sangre de Cristo range. Thus, the Taylor Ranch is in the mountain portion of the grant on which wood is available. In contrast, the western portion of the grant is along the valley floor and thus was cleared and used for farming. There are obviously other mountain areas of the original million-acre Sangre de Cristo grant other than the Taylor Ranch; these are not at issue here.

be made. Availability of pasture, water, and firewood on common lands was among the primary considerations:

> The primary considerations were whether the land was being used or claimed by others, the sufficiency of the petitioner's qualifications, and in the case of a community grant, *the availability of resources like pasture, water, and firewood.*

Id. (emphasis added). Large private grants were made during the Mexican period. If the recommendation from the *alcalde* was favorable, the governor would make the private grant to an individual. The individual's ownership, however, was conditional upon successful settlement of the grant.

Agriculture and stock raising were the primary means of subsistence for the settlers on the grants. *Id.* at 25. The settlers supplemented their irrigated plots by use of commonly accessible community or private grant lands for gathering firewood and grazing livestock:

> The pattern of land tenure and use was the foundation for these tightly knit communities. Produce from their small irrigated plots *supplemented by the use of common lands for gathering firewood and for grazing a few head of livestock* furnished the bare necessities for the village families, a lifestyle to which they were accustomed.

Ira G. Clark, *Water in New Mexico, A History of Its Management and Use* 34 (1987) (emphasis added).

Under colonial and Mexican law, the difference between a community grant[7] and a private grant was that the common

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[7] Because the lands of a community grant could not be sold and were held in common in perpetuity, settlers could use them for hunting, fishing, gathering herbs, and rock quarrying, among other uses, without any question or conflict with subsequent landowners or the need of courts to define the intended uses. Some private grants operated like community grants; others did not. *See* Ebright, *supra,* at 25. Two examples of community grants in the Sangre de Cristo grant are the San Luis vega and chapel referenced in the Beaubien Document. The chapel and the vega

lands of the community could not be sold; the grantee of a private grant could sell the lands. *See* Ebright, *supra*, at 25.

Expert reports submitted in this case reveal that Beaubien and the original settlers operated under this traditional system. Common areas were not only a typical feature but a necessary incentive for settlement.

As discussed above, because the Sangre de Cristo grant was part of the United States at the time permanent settlement began, this Mexican settlement tradition is not the source of the landowners' rights. However, because the settlers and Beaubien were so familiar with the settlement system, it is highly relevant in ascertaining the parties' intentions and expectations.

The express language in the Gilpin agreement, recorded one year after the Beaubien Document, further supports the conclusion that the rights referenced in the Beaubien Document were meant to burden the land. Gilpin was Beaubien's immediate successor as owner of the grant land. The Gilpin agreement contains an express condition confirming the settlers' rights:

> [Gilpin agrees to the] express condition that the settlement rights before then conceded by said Charles Beaubien to residents of Costilla, Culebra & Trinchera, within said Tract included, shall be confirmed by the said William Gilpin as confirmed by him.

This deed also recites that the settlers paid consideration to Beaubien for those rights and that Gilpin succeeds to the settlers' obligations to Beaubien, including payments due on promissory notes held by Beaubien and his agents. The Gilpin

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continue to exist in the town of San Luis and they are used for the originally intended purposes as a church and as a common pasture. Although a portion of the Beaubien Document establishes these two community grants, the general references to settlement rights were meant to memorialize access and use rights. This is clear from the Gilpin agreement.

agreement is in Taylor's chain of title and Taylor's own deed expressly refers to the landowners' settlement rights.

Thus, we conclude both that rights were granted and exercised from the time of settlement and that the Beaubien Document memorialized them. Moreover, we conclude that the location for the rights is the mountain portion of the grant of which Taylor Ranch is a part, and that the benefit and burden of these rights were meant to run with the land.

We do not take issue with the court of appeals' application of 1863 Colorado property law to the Beaubien Document. It is not surprising that Carlos Beaubien failed to comply with the nuances and technical requirements of the conveyance of real property rights. Beaubien's failure to comply with the territorial property law, however, is not the end of the inquiry. The territorial supreme court made it clear that rights to access and use the property of another landowner could be found in the law of implied easements. *Yunker v. Nichols*, 1 Colo. 551 (1872). The law of implied easements recognizes that rights may be implied even though they were not properly expressly conveyed. This well-established area of property law is concerned with honoring the intentions of the parties to land transactions and avoiding injustice.

2. Implied Grant of Settlement Rights

The evidence in this case overwhelmingly supports the conclusion that the landowners have implied rights in the Taylor Ranch. We first review the law of implied servitudes. Second, we discuss how traditional settlement practices, repeated references to settlement rights in documents associated with the Sangre de Cristo grant, the hundred year history of the landowners' use of the Taylor Ranch, and other evidence of necessity, reliance, and intention support a finding of implied rights in this case.

a. Implied Servitudes

An easement is created if the owner of the servient estate either enters into a contract or makes a conveyance intended

to create a servitude that complies with the Statute of Frauds or an exception to the Statute of Frauds. Restatement, *supra*, § 2.1.

> Servitudes that are not created by contract or conveyance include servitudes created by dedication, prescription, and estoppel. Those which are not created by express contract or conveyance are the implied servitudes, which may be based on prior use, map or boundary descriptions, necessity, or other circumstances surrounding the conveyance of other interests in land, which give rise to the inference that the parties intended to create a servitude.

Id. § 2.8 cmt. b; *see also Wright v. Horse Creek Ranches*, 697 P.2d 384, 387-88 (Colo.1985) (noting that an easement may be established by "necessity; by preexisting use; by express or implied grant; or by prescription"); *Wagner v. Fairlamb*, 151 Colo. 481, 484, 379 P.2d 165, 167 (1963)(noting that implied easements are "not expressed by the parties in writing, but . . . arise[ ] out of the existence of certain facts implied from the transaction").

Easements can be implied in a number of situations. Easements created by prescription, Restatement, *supra,* § 2.17; easements by estoppel, *id.* § 2.10; and easements implied from prior use, *id.* § 2.12, are the most relevant to this case. We discuss each of these in turn, discussing both Colorado case law and the Restatement, which is consistent with our precedent.

An easement by prescription is established when the prescriptive use is: 1) open or notorious, 2) continued without effective interruption for the prescriptive period, and 3) the use was either a) adverse or b) pursuant to an attempted, but ineffective grant. *Id.* § 2.17, § 2.16.

A court can imply an easement created by estoppel when 1) the owner of the servient estate "permitted another to use that land under circumstances in which it was reasonable to

foresee that the user would substantially change position believing that the permission would not be revoked," 2) the user substantially changed position in reasonable reliance on that belief, and 3) injustice can be avoided only by establishment of a servitude. *Id.* § 2.10. Whether reliance is justified depends upon the nature of the transaction, including the sophistication of the parties. *Id.* § 2.9 cmt. e. The Restatement does not have a requirement of deception, neither does Colorado.[8] *See Graybill v. Corlett*, 60 Colo. 551, 154 P. 730 (1916); *Hoehne Ditch Co. v. John Flood Ditch Co.*, 68 Colo. 531, 191 P. 108 (1920). An easement by estoppel is an equitable remedy. It recognizes that when a landowner induces another to change position in reliance upon his promise, he is estopped from then denying the existence of the rights simply because they did not meet the formal conveyance rules. The rule "is founded on the policy of preventing injustice." *Id.* § 2.10.

Colorado law has repeatedly recognized this equitable right. For example, in *Graybill*, we examined a landowner's right to maintain a water ditch across the land of his neighbor. The owner of the servient estate had granted the owner of the dominant estate the right to establish a ditch across his land. This was an oral promise; the parties did not comply with conveyance and recording formalities. 60 Colo. at 552, 154 P. at 730. In reliance on the parol agreement, the owner of the dominant estate used the ditch as the irrigation source for his land and cleaned, repaired, and made improvements to the ditch. *Id.* On these facts, we noted that, "[i]t is too well settled to require discussion that under the circumstances above stated a licensee holds under an irrevocable license, and his right is as valid as if acquired by grant." *Id.* at 553, 154 P. at 731; *see also Hoehne Ditch Co.*, 68 Colo. 531, 191 P. 108

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[8] *Aubert v. Town of Fruita*, 192 Colo. 372, 559 P.2d 232 (1977), has no impact here because that case deals with estoppel in the context of water rights as opposed to estoppel in the context of easements, such as ditches.

(applying the "well settled" rule that "although an oral contract relating to realty is within the statute [of frauds], where a consideration has passed, and it has been fully performed by both parties and possession taken in pursuance thereof, the bar of the statute is removed and equity will enforce the right thus acquired").

An easement implied from prior use is created when 1) the servient and dominant estates were once under common ownership, 2) the rights alleged were exercised prior to the severance of the estate, 3) the use was not merely temporary, 4) the continuation of this use was reasonably necessary to the enjoyment of the parcel, and 5) a contrary intention is neither expressed nor implied. Restatement, *supra,* § 2.12; *see also Lee v. Sch. Dist. No. R-1*, 164 Colo. 326, 435 P.2d 232, 235-36 (1967); *Proper v. Greager*, 827 P.2d 591, 593 (Colo.App.1992). The rationale for this servitude is as follows:

> The rule stated in this section is not based solely on the presumed actual intent of the parties. It furthers the policy of protecting reasonable expectations, as well as actual intent, of parties to land transactions.

Restatement, *supra*, § 2.12 cmt. a.

Colorado has long applied this implied easement. This court has found an easement from prior use in *Lee.* In *Lee*, the owner of one parcel of land claimed a right of way across his neighbor's land to access his property. The servient and dominant estates had once been under common ownership and this right of way was used before the severance of title. Seven years after the severance of title, the defendant bought the servient estate and attempted to block the right of way, claiming a lack of an enforceable agreement. This court found that an easement from prior use had been established. *Lee,* 164 Colo. at 333, 435 P.2d at 236.

Similarly, the court of appeals found an easement from prior use in *Proper*. There, the plaintiff landowner used his neighbor's land to access his property. This use had begun when the two plots were under common ownership. Although the neighbor allowed this use, there was no formal agreement. The neighbor sought to rescind his permission after twenty-five years of the easement's use, and to construct a fence. *Proper* 827 P.2d at 592. The court found that under these facts, an easement from prior use had been established. *Id.* at 594.

Having outlined the law of implied easements, we now turn to the facts of this case.

b. Application to the Landowners' Claims

Despite the long history of implied easements in Colorado, the court of appeals in this case rejected the landowners' claims of an implied easement. The court did so because it believed that, although easements in the form of access rights could be implied, easements in the form of profits could not. *Lobato*, 13 P.3d at 833. In reaching this conclusion, the court misapplied a 1964 decision of this court, *Dawson v. Fling*, 155 Colo. 599, 396 P.2d 599 (1964).

In *Dawson*, the Flings claimed easement rights to a lake owned by a corporation. The document establishing the rights was a deed which read, in part, that the lake could be used "for boating and swimming purposes, for the use of said grantees by themselves, their heirs and assigns, their servants, agents, friends, guests, and whomever they may select." *Id.* at 602, 396 P.2d at 601. Although the deed specified boating and swimming rights, the Flings petitioned the court to find that they had the right to fish as well. This court concluded that the language of the conveyance clearly limited the rights to boating and swimming and thus declined to imply fishing rights as well. *Id.* at 604, 396 P.2d at 602.

In dicta, this court asserted that "[a] right to profits à prendre must be expressly granted." *Id.*, 396 P.2d at 601.

However, from the circumstances of the case it is clear that this court declined to find implied rights because the deed of conveyance expressly limited the rights: "A court cannot rewrite a contract and thereby change its terms when it is plain, clear and unambiguous." *Id.* at 604-05, 396 P.2d at 602. In *Dawson,* then, a crucial element of an implied easement was missing because a contrary intention was expressly stated in the deed. For that reason, we declined to imply additional profits in *Dawson.*

Although this court has not addressed implied profits for over thirty-five years, there is a modern trend to apply the same rules to easements of access and to profits. *See, e.g., State v. Kortge*, 84 Or.App. 153, 733 P.2d 466, 469 (1987) (noting that "[w]hether defendants' rights are in the nature of a profit a prendre or an easement, the interests in this case are governed by the same general rules"); *Figliuzzi v. Carcajou Shooting Club*, 184 Wis.2d 572, 516 N.W.2d 410, 415 (1994) (applying a statutory rule of easements to profits in part because the court was persuaded by the Restatement of Property § 450 Special Note (1944), which states that it treats "easements" and "profits" the same because "in no case was there a rule applicable to one of these interests which was not also applicable to the other").

The Restatement explains that, although some profits such as mineral and water rights[9] have specific rules, generally as

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[9] The case before us contains no claim to water use based on the Beaubien Document. We note that on April 10, 1852, the settlers of the Sangre de Cristo grant commenced construction of the San Luis People's Ditch, the oldest irrigation right in Colorado in continuous use. *See* Carl Ubbelohde et al., *A Colorado History, Revised Centennial Edition* 195 (1976). All water in Colorado is a public resource, dedicated to the beneficial use of public agencies and private persons wherever they might make beneficial use of the water under use rights established as prescribed by law. *See Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 706 (Colo.2002).

between easements in the form of access rights and easements in the form of profits, "there are no doctrinal differences between them." Restatement, *supra*, § 1.2 reporter's note.[10] "Generally, the rules governing creation, interpretation, transfer, and termination of easements and profits are the same in American law." *Id.* § 1.2 cmt. e.

Easements and profits are treated equally because the same public policy and practical considerations that underlie implied rights of access also underlie implied profits. A recognition that parties do not always comply with strict rules of express conveyance, a desire to effectuate the intent of the parties, and the aim of fairness apply equally to easements and profits.

Colorado law is replete with precedent that reflects a strong policy to be true to parties' intentions and recognizes that Colorado's unique history and geography further necessitate judicial recognition of implied rights in land. *See, e.g., Roaring Fork Club v. St. Jude's Co.*, 36 P.3d 1229, 1231 (Colo.2001)(noting that "our lawmakers [have] recognized that our arid climate require[s] the creation of a right to appropriate and convey water across the land of another"); *Lazy Dog Ranch*, 965 P.2d at 1235 (in determining the scope of an easement, noting that the "paramount concern" is to ascertain the intentions of the parties and that when a deed is silent as to a particular right, the court shall look at the circumstances surrounding the transaction); *Thompson*, 895 P.2d at 540 (in implying an easement, noting that "sound public policy dictates that land should not be rendered unfit for occupancy and that there is a presumption, therefore, that whenever a party conveys property he conveys whatever is

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[10] The first Restatement of Property, concluding that the same rules apply to easements of access as to profits, dropped the term "profit." However, because the word "profit" is useful as a descriptive term, it survives. Restatement, *supra*, § 1.2 cmt. e.

necessary for the beneficial use of that property" (quotation marks omitted)); *Yunker*, 1 Colo. at 554 (noting that certain water rights are necessary for enjoying land and that the law will "imply a grant of such easement where it is especially necessary to the enjoyment of the dominant estate," and that such rights come not out of the literal terms of the contract, but rather out of "pre-existing and higher authority of laws of nature, of nations, or of the community to which the parties belong").

Thus, the aim of honoring parties' intentions and avoiding injustice that the Restatement expresses has long been the goal of Colorado law. Specifically, Colorado has a strong history of implying servitudes based on equitable concerns. As the Restatement concludes, it is arbitrary and inconsistent to apply these principles to easements of access but not to profits.[11] Such a limitation would be directly contrary to our legacy of implied easements.

Having concluded that the trial court and court of appeals in this case incorrectly held that Colorado law does not recognize implied easements in the form of profits, we now apply the law of implied easements to the landowners' claims.

Our review of the record leads us to conclude that there is ample evidence to imply certain rights in the landowners to access and use the Taylor Ranch. The prior unity of title of

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[11] Notably, one of the goals of the Restatement is to "present [ ] a comprehensive modem treatment of the law of servitudes that substantially simplifies and clarifies one of the most complex and archaic bodies of 20th century American law. . . . It is designed to allow both traditional and innovative land-development practices using servitudes without imposing artificial constraints as to form or arbitrary limitations as to substance." Restatement, *supra*, Introduction at 3.

the landowners' and Taylor's land; the necessity of the rights; the significant reliance upon the promise of these rights; the fact that the rights were exercised for over one hundred years; and fact that these rights were memorialized in the Beaubien Document, the Gilpin agreement, and every deed of conveyance in Taylor's chain of title, satisfy every element of the Restatement test and the implied easements we recognized in the cases discussed above.

i. Prescriptive Easement

Because Taylor's deed indicates that Taylor's ownership of the land is subject to the landowners' prescriptive rights, we begin with an application of the law of prescriptive easements. The court of appeals in this case concluded that the landowners failed to prove a prescriptive easement claim because their use was not adverse. *Lobato*, 13 P.3d at 834. The court erred in this respect.

Although adversity is a necessary requisite for adverse possession claims, *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989), it is not required for a prescriptive easement. Courts often find prescriptive easements even when the owner of the servient estate allows the use. Significantly, the Restatement articulates that a prescriptive use is either:

> (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
>
> (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

Restatement, *supra*, § 2.16.

Although an easement by prescription without adversity has been codified only in the recent restatement, "it has always been present in American servitudes law." *Id.* § 2.16 cmt. a. Because many jurisdictions technically required

adversity for a prescriptive easement, decisions in those states often used "convoluted explanations" to explain how a permitted use was actually hostile and met the adversity requirement. *Id.* Some courts acknowledged an exception to the adversity rule in certain circumstances. *See, e.g., Nat'l Props. Corp. v. Polk County*, 386 N.W.2d 98, 105 (Iowa 1986)(noting that there may be a prescriptive easement even "where the original use was with a servant [sic] owner's consent"); *Kirby v. Hook*, 347 Md. 380, 701 A.2d 397, 404 (1997)(applying an exception to the "general rule [that] permissive use can never ripen into a prescriptive easement ... where there has been an attempt to grant an irrevocable easement which is void because of the statute of frauds"). Other jurisdictions, such as Colorado, simply glossed over the adversity requirement without comment. *See, e.g., Wright*, 697 P.2d at 388 (finding an easement by prescription in the form of a right of way across the servient estate even though the use of the right of way was permitted and ultimately reduced to writing); *Proper*, 827 P.2d at 595-96 (listing adversity as a requirement of an easement by prescription but then, although the parties stipulated that the use was permissive, finding a prescriptive easement for access and use of a commercial parking lot via a complex application of presumptions).

It has long been established, then, that the element of adversity is not required in all circumstances. It is not required when other evidence makes clear that the parties intend an easement, but fail "because they do not fully articulate their intent or reduce their agreement to writing, or because they fail to comply with some other formal requirement imposed in the jurisdiction." Restatement, *supra*, § 2.16, cmt. a. Thus, the court of appeals in the current case erred when it required a finding of adversity in all circumstances.

Having established that adversity is not required when a grant has been imperfectly attempted, we turn to the facts of the current case. The trial court's findings of fact and our interpretation of the Beaubien Document fit every element of a prescriptive easement.

First, the use must be open and notorious. There is no doubt that the landowners' use was well known to Taylor and his predecessors in title. The trial court noted that Taylor's predecessors in title not only knew of the landowners' access, but they even went so far as to direct the location of grazing. Most significantly, Taylor and his predecessors in title had express notice of the landowners' claims of right from the language of their deeds. The use was open and notorious.

Second, the use must continue without effective interruption for the prescriptive period. In Colorado, the statutory period is eighteen years. § 38-41-101, 10 C.R.S. (2001); *Proper*, 827 P.2d at 595. Here, the trial court explicitly found that the landowners and their predecessors in title "grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted and recreated on the land of the defendant from the 1800s to the date the land was acquired by the defendant, in 1960." The trial court also found that this access was never denied. This more than satisfies the statutory time period.

Third, the access must either be adverse or pursuant to an intended, but imperfectly executed, grant. Here, the access was permissive, rather than adverse. However, there is ample evidence of an intended grant of these rights. The Beaubien Document, although imperfect as an express grant, evidences Beaubien's intent to grant rights to the landowners' predecessors in title (*see supra*). Moreover, the express language in the deeds of conveyance for the Taylor Ranch, from Gilpin ultimately to Taylor, indicate an intention that the rights burden the land.

Thus, the landowners have established a prescriptive claim.[12]

ii. Easement by Estoppel

The landowners have also established every element of an easement by estoppel. First, Taylor's predecessors in title "permitted [the settlers] to use [the] land under circumstances in which it was reasonable to foresee that the [settlers] would substantially change position believing that the permission would not be revoked." Restatement, *supra*, § 2.10. The settlers' reliance was reasonable because rights were expected, intended, and necessary. It was expected because of the Mexican settlement system discussed above. Also discussed above, this settlement system, combined with the actual practices and the deeds associated with the Taylor Ranch, show that rights were intended.

The rights were also necessary. The plaintiffs' expert, Dr. Marianne Stoller, testified that access to wood was necessary to heat homes, access to timber was necessary to build homes, and access to grazing was necessary for maintaining livestock.[13] Moreover, Beaubien included each of these resources

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[12] The trial court in the current case heard evidence and ruled on the prescription claim as a matter of judicial economy. However, the court also ruled that the landowners could not bring a prescription claim because Taylor did not have adequate notice. Our review of the record does not support this determination. Although the landowners did not formally file for leave to add a prescription claim until 1992, all of their factual allegations from the birth of this case clearly implicate prescriptive rights—particularly their claim that they and their predecessors in title continuously accessed the Taylor Ranch for over one hundred years. Significantly, the deed of conveyance explicitly informed Taylor that he purchased the land subject to the "claims of the local people by *prescription* or otherwise." (Emphasis added.) Taylor had adequate notice of this claim.

[13] Dr. Stoller, at one point in her testimony, also mentioned that the settlers fished, hunted, and recreated on the land. She did not, however, indicate that such practices were necessary. Significantly, in her written

in a lease to the United States for the first military post in Colorado. *See* LeRoy R. Hafen & Ann W. Hafen, *Colorado: A Story of the State and its People* 130 (1947). The trial court found that during the 1850s Beaubien executed a lease to the United States government for the maintenance of Fort Massachusetts on grant land. In this lease Beaubien granted the army the right to "pasture, cut grass, timber and collect firewood" on Beaubien's land. We can safely assume that the United States was more sophisticated in its dealings with Beaubien than were the landowners' predecessors in title and that it insisted on putting Beaubien's promises into writing.[14] Under these circumstances, it is reasonable to foresee that that a settler would substantially change position believing that the permission would not be revoked.

The second element, that the user substantially change position in reasonable reliance on the belief, is easily found. The landowners' predecessors in title settled Beaubien's grant for him. They moved onto the land and established permanent farms.

The third element, the avoidance of injustice, is also undeniably present. The original Sangre de Cristo grant was given on the condition that it be settled. Indeed, under Mexican law, the grant would have been revoked if settlement did not succeed. The settlers, then, fulfilled the condition of the grant that made Beaubien fee owner of one million acres of land.

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report, which the landowners submitted to the trial court, Dr. Stoller lists the landowners' rights as use rights to "pasture, firewood, timber, and water."

[14] The landowners' expert, Dr. Stoller, agreed that the rights included in Beaubien's lease to the government were significant: "he gave [the United States Army] use rights for pasture, cutting grass, firewood and timber to the adjacent lands. . . . Thus he was following the same practice in the 1863 document for his settlers, and for the same reasons—the need for these resources for human survival."

Beaubien attracted settlers to the area by convincing them that he would provide them with the rights they needed for survival. Beaubien knew that families would rely on his promises and leave their homes to travel hundreds of miles on foot or horseback to establish new homes.

A condition of the conveyance of Beaubien's land, from Gilpin down to Taylor, was that the owner honor these rights. Although these promised rights were exercised for over one hundred years, although these rights were necessary to the settlers' very existence, and although Taylor had ample notice of these rights, Taylor fenced his land over forty years ago. It is an understatement to say that this is an injustice.

The landowners have established each element of an easement by estoppel.

iii. Easement From Prior Use

Lastly, every element of an easement from prior use has been shown. First, both Taylor's and the landowners' lands were originally under the common ownership of Beaubien who owned the entire Sangre de Cristo grant before settlement. *See Tameling v. United States Freehold Land & Emigration Co.*, 2 Colo. 411 (1874).

Second, the rights were exercised prior to the severance of the estate. As discussed above, many of the rights the landowners claim were needed and expected for life in the San Luis Valley. This necessity existed from the first days of settlement—indicating that these rights were exercised prior to severance of title.

The third and fourth prongs-that the use was not merely temporary and is reasonably necessary to the enjoyment of the land—are also easily established. The trial court's findings of fact establish that the rights were exercised from the time of settlement until Taylor came on the scene. Moreover, as discussed above, the rights were reason ably necessary.

Lastly, no contrary intention is expressed or implied; thus, the fifth element is present. Custom, expectation, practice, and language in the documents and deeds surrounding the Taylor ranch property indicate not only that a contrary intention did not exist, but that the parties affirmatively intended for these rights to exist.

All five elements of an easement from prior use have been established.

C. Extent of the Rights

Having found that the landowners have implied profits in the Taylor Ranch, we now must address the scope of those rights. We imply the rights memorialized in the Beaubien Document. We do so for four reasons.

First, the document is the strongest evidence we have of the parties' intentions and expectations. Second, the rights in the document were likely the most necessary. Third, the Fort Massachusetts lease lists these same rights. Fourth, the document is the only evidence we have of an attempted express grant. This is particularly important for the prescriptive easement claim. *See* Restatement, *supra,* § 2.16 cmt. a.[15]

Accordingly, we hold that the landowners have implied rights in Taylor's land for the access detailed in the Beaubien Document—pasture, firewood, and timber. These easements

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[15] The landowners acknowledge that the Beaubien Document does not reference rights for hunting, fishing, and recreation and thus that there is no evidence of an express or implied grant of these rights from Carlos Beaubien. However the landowners claim that these rights exist via a prescriptive easement. We disagree. As discussed above, in order to find a prescriptive easement in the absence of adversity, there must be evidence of an attempted express grant. In this case, the Beaubien Document is the only evidence of an attempted express grant to the landowners. Because it makes no reference to hunting, fishing, or recreation, there can be no prescriptive easement for those rights.

should be limited to reasonable use-the grazing access is limited to a reasonable number of livestock given the size of the vara strips; the firewood limited to that needed for each residence; and the timber limited to that needed to construct and maintain residence and farm buildings located on the vara strips.

III. Remaining Issues

Over the years, a host of contested issues have arisen in this case; many were not addressed on appeal because the court of appeals' holding that the landowners did not have any rights rendered the ancillary questions moot. We have reviewed the remaining issues and conclude that the only appellate issue that must be addressed is whether the trial court engaged in the appropriate due process inquiry on remand from *Rael.*

In *Rael,* we remanded this case for a determination of which landowners received adequate notice in the Torrens title actions. 876 P.2d 1210. Although in *Rael* we highlighted facts in the record that indicated Taylor knew that local landowners claimed rights in the land, on remand the trial court found criteria other than landowning dispositive. The court dismissed most of the plaintiffs, allowing only seven to pursue their claims regarding the mountain tract and only three to pursue their claims regarding the Salazar estate. This must be reviewed.

As a matter of judicial economy, and as a matter of fairness, given the forty-one year denial of access to the Taylor Ranch and this twenty-one year litigation, we decline to remand this case to the court of appeals for a determination of this issue. Rather, we will revisit the due process issue after full briefing, in a separate opinion. *See Ballow v. Phico Ins. Co.*, 875 P.2d 1354, 1364 (Colo.1993)(retaining jurisdiction rather than remanding to the court of appeals as a matter of judicial economy).

IV. Conclusion

In sum, we imply access rights in the landowners to the Taylor Ranch for reasonable grazing, firewood, and timber. We reject the landowner's claims for hunting, fishing, and recreation. Before we remand to the trial court for a permanent order of access, additional briefing is necessary in order to determine which landowners received adequate notice in the Taylor and Salazar Torrens actions. The clerk of this court will set a briefing schedule for the parties.

Justice MARTINEZ dissents only as to part II.C.

Justice KOURLIS dissents, and Justice RICE joins in the dissent.

Justice COATS does not participate.

Justice MARTINEZ dissenting only as to part II.C.

As the opinion by the chief justice correctly notes, this case involves the settlement rights of people who have been largely dispossessed of their rights in land when Taylor fenced the property. There is little dispute that the settlers enjoyed extensive rights in the lands that comprise the Taylor Ranch for about one hundred years. Rather, the dispute concerns the extent of the rights, if any, that survive when we construe settlement rights conceived in a different era pursuant to contemporary standards. In short, the difficulty of this case is that we must address the grave injustices imposed upon the settlers' successors in interest by interpreting documents from a different era, intended to reflect Beaubien's intent, through the perspective of modern property law. Nonetheless, equitable principles in our modern jurisprudence, properly construed and applied, permit us to recognize the rights of the settlers and their successors in interest.

Because I concur with the chief justice's analysis and conclusion that the landowners have access rights through a prescriptive easement, an easement by estoppel, and an

easement from prior use [illegible]on to make it the majority opinion and refer to it as such herein. As the majority explains, the Beaubien document is an imperfect attempt at an express grant of rights clearly "meant to create permanent rights that run with the land," maj. op. at ___; such access rights were an "integral feature of the settlement system under which the settlers and Beaubien were operating." *Id.* at ___. Additionally, the Gilpin agreement provides further support that the settlement rights granted by Beaubien were intended to run with the land because that agreement required that Gilpin take the land on the condition that he recognize and confirm the settlement rights.

I also agree with the majority's analysis and conclusions regarding the implied servitudes upon which it bases its holding. The majority determines that the same rules should be applied to easements and profits and adopts the Re-statement's position that easements by prescription do not always require a finding of adversity; instead such easements may result from an intended but imperfectly created servitude.

In addition, I agree with the majority's conclusion that the landowners' access rights are also found through an easement from prior use and an easement by estoppel: The elements for both of these easements are met in this case. I particularly agree with the majority's strong language regarding the injustices that are avoided in finding access rights through an easement by estoppel.

In short, I summarize the majority's analysis, and my support for it, to emphasize the many areas of agreement I have with the majority and the extent to which I concur and join the majority opinion.

However, it is significant to me that the trial court's findings that the landowners also enjoyed access for fishing, hunting and recreation are supported by the record. As a

result, I would apply the reasoning of the majority opinion regarding prescriptive easement, easement by estoppel, and easement from prior use to conclude that the landowners have also established access rights for fishing, hunting, and recreation. Thus, while I join the majority opinion as to its analysis regarding the source of the landowners' rights, I do not join part II.C. of the majority's opinion, which excludes fishing, hunting, and recreation rights from its holding. However, I recognize that part II.C. of the chief justice's opinion is the controlling opinion in this case.

More specifically, though I agree with the majority's finding that the Beaubien document is an imperfect one and accordingly must be considered alongside extrinsic evidence in order to find the landowners have access rights through a prescriptive easement, an easement by estoppel, and an easement from prior use, *see* maj. op. at ___ - ___, I believe that document cannot be read to limit the landowners' access rights to grazing, firewood, and timber. In my view, the imperfect nature of the Beaubien document requires us to look beyond that document to determine the full scope of the landowners' access rights. As a result, I would not limit the landowners' access rights; instead, based on the evidence in the record demonstrating that "settlement rights" encompassed more than grazing, firewood, and timber, I would also include access rights for fishing, hunting, and recreation through a prescriptive easement, an easement by estoppel, and an easement from prior use.

I. The Trial Court Findings Regarding Settlement Rights for Fishing, Hunting, and Recreation

The trial court made strong findings that "[t]he plaintiffs' predecessors in title grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted and recreated on the land of the defendant from the 1800s to the date the land was acquired by the defendant, in 1960." The trial court also found that, prior to 1960 when Taylor fenced the land, the

landowners referred to that land as "open range" and that the landowners were "never denied access to the land for grazing of cattle, sheep, harvesting timber, gathering firewood, fishing, hunting, or recreating." My review of the record reveals that that [sic] the trial court's findings of fact that fishing, hunting, and recreation were included in the settlement rights contemplated by the Beaubien document are correct.

Several expert historians filed reports in this case, some of whom also testified at trial. Some of these reports include commentary regarding fishing, hunting, and recreation as part of settlement rights. For example, the report filed by Dr. Michael Meyer, professor emeritus at the University of Arizona, concluded that the common lands in the settlement systems provided material resources such as "fuel to keep warm during the cold winter months, a varied diet of fruits, vegetables, grains and meat." The reference to "meat" as one of the resources available from the common lands implicitly refers to hunting that took place on the common lands. Dr. Meyer's report further expanded on the uses of the common areas, stating that [t]he common lands were put to many uses in Spanish and Mexican New Mexico, including fishing, hunting (of wild turkeys, deer and other game), threshing, recreation, the gathering of wild herbs, fruits and nuts (especially piñones) and the disposal of refuse but most importantly they were used for grazing, watering of stock animals, and the cutting of wood.

Dr. Meyer's report also explained that among the various primary documents giving a legal basis for common lands use is the Plan de Pitic, which was the founding document for several New Mexico towns, but also "specifically given general applicability for all of the towns in the northern New Spain." This document provided that common lands be set aside around each settlement "so that the settlers can use them for recreation [and] go out with their cattle without doing damage."

Dr. Marianne Stoller, professor of anthropology at the Colorado College, filed an expert report and testified at trial. Although her report does not explicitly mention fishing, hunting, and recreation, her report concludes that the Beaubien document clearly guarantees the landowners' right of access to common lands. Significantly, her report also concludes that the Beaubien document "is made more understandable by looking at the context of the political and social circumstances surrounding its creation, and by understanding the nature of the economic circumstances, ecology, and topographical characteristics of the area."

Although Dr. Stoller's report did not expressly address fishing, hunting, and recreation, her trial testimony did. When asked to express her opinion regarding the use of the common lands by successive generations of landowners between 1863 and 1960, she replied, in pertinent part, that "[t]hey were used for hunting of wild animals. They were used for fishing. . . . And recreation." When asked whether there was specific, visible evidence of such use of the common lands, she replied:

> There were roads that went partway up most of the tributary valleys. . . . There were trails that crisscrossed the mountain lands. . . . There were signs of people having cut wood for the purpose I described. There were animals, there were there were sheep and cattle grazing. There were wild animals to be seen. There were fish in the streams.

Additionally, Dr. Stoller, consistent with her report, testified that one must look beyond the text of the Beaubien document when interpreting the intent of Beaubien and the settlers with regard to access rights. When asked about Beaubien's purpose in authoring the document, Dr. Stoller replied that his purpose was to record the use rights of the people to the common lands. However, she specifically pointed out that one reading the Beaubien document must

look beyond the actual text of that document in interpreting the rights it includes:

> He set aside land for pasture, lowlands, the vega lands, specifically saying that these lands were to be used only for animals that were necessary for domestic purposes. . . . And he designated the lands that could be used for pastures, for flocks-and *he did not use the word "flocks," but this is to be understood*, given the nature of the economy of these people, an agro-pastoral economy.

(Emphasis added.) Dr. Stoller further explained the need to look beyond the text of the document to properly interpret the scope of the access rights it contemplated:

> Because [the Beaubien document], like any document, has to be interpreted. And one has to go beyond it to understand the geography. That document contains place names. One has to know where those place names are. It refers to different types of lands. One has to know what those lands are, where they are. All those kinds of things are necessary in order to interpret such a document. . . . The lands spoken of in the document include the agricultural lands, they include the mountain lands, they include the pasture lands, the vega lands. Lands, in other words, that provide different resources and that are for different purposes.

This testimony demonstrates the necessity of looking to other evidence beyond the Beaubien document in order to fully understand the different uses that settlers made of these lands. Such other evidence demonstrates that fishing, hunting, and recreation were uses to which the lands were put.

Thus, Dr. Stoller's testimony is significant for two reasons. First, her testimony establishes that any interpretation of the rights contemplated by the Beaubien document must necessarily go beyond the specific text of that document and consider other evidence of the social, political, historical, and

economic circumstances at the time the document was authored; we must look beyond the text of the Beaubien document to determine the scope of the access rights to which the landowners are entitled.

Second, Dr. Stoller's testimony demonstrates that fishing, hunting, and recreation, although not expressly mentioned in the Beaubien document, were important to the settlers, just as grazing and gathering firewood and timber were. Accordingly, I believe that the evidence of settlers' fishing, hunting, and recreation activities is evidence of the "political and social circumstances surrounding" the creation of the Beaubien document, and that such evidence increases our "understanding the nature of the economic circumstances, ecology, and topographical characteristics of the area."

Further, the expert report and testimony of Dr. Maria Montoya, professor of history and American culture at the University of Michigan, also supports the trial court's findings. The majority of Dr. Montoya's scholarly research and writing relates to the Maxwell land grant. The Maxwell grant, although not the subject of the present case, is nonetheless closely related to the Sangre de Cristo grant that is the subject of this case. The Maxwell grant, located directly to the southeast of the Sangre de Cristo grant, was also owned by Beaubien. Dr. Montoya testified that the history of the two grants is closely related and that she studied the Beaubien document in the context of her research of the Maxwell grant.

More specifically, Dr. Montoya's report noted that the activities of the settlers that lived on both the Maxwell and the Sangre de Cristo grants were similar. She explained that on both grants, people "settled along the river valleys using similar land use settlement patterns of community living based around a plaza with privately held strips of land (varas), and common areas used for *hunting*, grazing, and wood collection." (Emphasis added.) Her report traces the use

of the land that makes up both grants back to the Plains tribes, opining that although these tribes practiced agriculture,

> hunting was the mainstay of their existence. . . . Large animals such as buffalo, mountain sheep, antelope, deer and elk provided not only food but also material goods. They used the hides to make housing covers, sinew for thread, rawhide for ropes and straps, and tanned skins for clothing and shoes. We can infer that this use of the lands for hunting continued after the Mexican government began to approve land grants such as the Maxwell and Sangre de Cristo grants based on community opposition to the Maxwell grant. The Maxwell grant, unlike the Sangre de Cristo grant, did not expressly reserve rights to common lands for settlers through a document similar to the Beaubien document. As a result, some members of the community feared that the Maxwell grant would be put to commercial use to the exclusion of historical, local use by the settlers for hunting and grazing. In particular, soon after Beaubien received the Maxwell grant, a community member named Father Jose Antonio Martinez lodged an objection. One of Martinez's grounds for objecting was that putting the lands that comprised the Maxwell grant (which were put to similar use as the lands that comprised the Sangre de Cristo grant) into private hands would deprive those living on the lands of their livelihood, which consisted of hunting as well as grazing livestock.

The conclusion that hunting was an important aspect of the settlers' activities on both the Maxwell and Sangre de Cristo grants is supported by the findings of another expert. A report filed by Malcolm Ebright, an historian, attorney, and president of the Center for Land Grant Studies in New Mexico, also concluded that Martinez opposed the Maxwell grant because the grant "included the communal hunting and grazing lands" of settlers.

Finally, testimony from at least one of the landowners also supports the trial court's conclusion that recreation was included in the settlement rights contemplated by Beaubien and the settlers when the document was authored. Emilio Lobato, Jr., who resides near the Taylor Ranch, can trace his ancestry back to Cristobal Lobato, one of the early settlers. In addition, his great-grandmother was an original settler in 1851. He described the use he and his family made of the land when he was a child, stating tha he would use the land for "hiking, horseback riding, just exploring." He also testified that he and his family would go on picnics on the Taylor Ranch land. Although such contemporary recreational use of the Taylor Ranch lands occurred several generations after Beaubien authored the document and the original settlers arrived, the fact that such use persisted from generation to generation is further evidence that recreation rights were considered settlement rights and thus contemplated by the Beaubien document.

In sum, the evidence presented at trial and through expert reports, as well as the testimony of at least one lay witness, supports the trial court's findings of fact that fishing, hunting, and recreation were an important part of the settlers' activities in the region that includes the Taylor Ranch at the time the Beaubien document was authored in the 1860s. In addition, much of the expert testimony and reports also concluded that the Beaubien document must be construed by considering the social, economic, historical, and geographical context in which it was authored, and not strictly based on the actual text. As a result, applying the same analysis as the majority, I conclude that fishing, hunting, and recreation rights were contemplated by the Beaubien document and must therefore be included in the cess rights to which the landowners are entitled.

II. The Scope of Access Rights

My disagreement with the majority opinion is with its application of easements by prescription, by estoppel, and from prior use to limit the landowners' access rights to "the rights memorialized in the Beaubien document." Maj. op. at ___. Instead, applying the legal frameworks of easements by prescription, by estoppel, and from prior use to the trial court's findings of fact results in my determination that the landowners are entitled to access rights for fishing, hunting, and recreation as well as for grazing, firewood, and timber.

Looking, as we must, beyond the Beaubien document, which is imperfect, to extrinsic evidence to determine the full scope of the access rights intended by Beaubien reveals that access rights for fishing, hunting, and recreation must be recognized. The Gilpin agreement is one source of important extrinsic evidence. Significantly, both the Beaubien and Gilpin documents refer to settlement rights as if the scope of those rights was understood. Because I believe that there was no attempt to enumerate the specific settlement rights in either document, that neither document specifically mentions fishing, hunting, and recreation is not dispositive as to the scope of the settlement rights accorded to the first settlers.

As a result, extrinsic evidence beyond these documents must be considered. Such extrinsic evidence includes the social, economic, political and historical character of settlement rights. As my discussion of the record reveals, evidence adduced at trial supports the trial court's findings that fishing, hunting, and recreation were contemplated by the Beaubien document, and thus the Gilpin agreement, although not mentioned individually in either document. Accordingly, all six access rights sought by the landowners are properly recognized through a prescriptive easement, an easement by estoppel, and an easement from prior use.

Because I would hold that the landowners have access rights for all six settlement rights, I am unpersuaded by the four reasons given by the majority for limiting its recognition of access rights to grazing, firewood, and timber. *See* maj. op. at ___. I briefly address each of these four reasons.

First, the majority asserts that the "document is the strongest evidence we have of the parties' intentions and expectations." *Id.* While I agree that the Beaubien document is strong evidence of the parties' intentions, that document cannot be considered as the *only* expression of those intentions, or even the strongest expression. Instead, because the document is imperfect and ambiguous, extrinsic evidence must be considered in reconstructing those intentions. Because the trial court's findings of fact regarding all six settlement rights are supported by the record, I find that it is logically consistent to determine that the landowners have established access rights for all six settlement rights; to find otherwise treats the Beaubien document as a proper, perfect, express grant.

Second, the majority contends that the rights in the document were "likely the most necessary." *Id.* I agree that grazing herds and gathering firewood and timber were necessary for the survival of the settlers. The record supports such a conclusion. *See id.* However, a finding that fishing and hunting were necessary settlement rights is also supported by the record. Further, although recreation is arguably not necessary for survival, there is ample evidence in the record that recreation was considered an important settlement right. *See* part *I, supra.*

Third, the majority gives weight to the fact that the Fort Massachusetts lease lists the same rights as the Beaubien document to support its exclusion of fishing, hunting and recreation rights. However, because the record reveals that the purpose of Fort Massachusetts was importantly different from the purpose of the Sangre de Cristo settlement, I do not

give great weight to that lease in discerning the full scope of the landowners' access rights. More specifically, as explained by Dr. Stoller, the purpose of Fort Massachusetts was to "protect the settlements ... and to further U.S. policy towards Indians of rounding them up and confining them to a reservation." Although the rights to graze and collect timber and firewood articulated in the lease were necessary activities for maintaining an army fort, the fundamentally different purposes between Fort Massachusetts and the Sangre de Cristo settlements lead me to give little weight to that lease as evidence regarding the scope of the landowners' access rights.

Finally, the majority argues that the Beaubien document is the "only evidence we have of an attempted express grant," which is important for a claim of a prescriptive easement. *See* maj. op. at ___. While I agree with this as a statement of fact, I do not believe that it provides a basis for discriminating between the settlement rights of grazing and collecting firewood and timber that are contained in the Beaubien document and the settlement rights of fishing, hunting, and recreation that are supported by other evidence in the record. As noted, the Beaubien document is an imperfect, ambiguous document that must be interpreted and construed by referring to extrinsic evidence; the evidence adduced at trial strongly supports the trial court's findings of fact that all six rights were considered settlement rights.

Accordingly, I believe that the legal concepts of prescriptive easement, easement by estoppel, and easement from prior use, when applied to the evidence adduced at trial, compel my conclusion that the landowners are entitled to all six settlement rights.

III. Conclusion

While I agree with the majority's articulation of the controlling law in this case, I disagree with its application of

that law to limit the scope of the landowners' access rights. Because I conclude that the trial court's findings that "[t]he plaintiffs predecessors in title grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted and recreated on the land of the defendant from the 1800s to the date the land was acquired by the defendant, in 1960" are supported by the record, I would find that the landowners enjoy access rights for grazing, collecting firewood and timber, fishing, hunting, and recreation on the Taylor Ranch. Accordingly, I dissent from part II.C. of the majority opinion and join the majority opinion as to all other parts.

Justice KOURLIS dissenting.

Although I have great sympathy for the historic and present plight of the landowners in this action, I cannot support the majority opinion for two reasons. First, it is my view that in 1863 Charles Beaubien attempted to make a community grant for the benefit of the inhabitants of the plazas of San Luis, San Pablo, and Los Ballejos. The law in effect at the time did not recognize such a grant and instead required individual identification of grantees. Hence, the Beaubien Document had no legal effect.

Second, I find no ambiguity either in the legal description in the Document or in the absence of grantee specificity. The legal description referred to the lands of the Rito Seco. The trial court found that the lands of the Rito Seco do not overlap with the current Taylor Ranch. There is no ambiguity; rather, the Document simply does not apply to Taylor Ranch. Additionally, the omission of grantee names was not an ambiguity: it was a clear attempt to create a communal grant, which was not legally recognized.

Because the Document is not ambiguous in any pertinent part, it cannot support an implication of rights not expressly set forth. Prescriptive easements, easements by estoppel, and easements from prior use do not apply to these facts.

Accordingly, I respectfully dissent from the majority opinion and would instead affirm the court of appeals' opinion upholding the trial court.

I. Community Land Grants

The historical records indicate that someone seeking a land grant would address a petition to the governor of the region describing the land and the individual's qualifications for ownership. Malcolm Ebright, Land Grants & Lawsuits in Northern New Mexico 23 (1994). If the petition was approved by the governor, and the alcalde (the mayor), then the governor would issue the grant. *Id.* There were two types of grants of land from the government: private grants to individuals who would own the land and who could sell it after they met a requirement of establishing possession of the land; and community grants.[1] *Id.* at 24.

Large private grants were made in an effort to settle new areas. The individual would not gain full title to the property until he had encouraged a sufficient number of people to move into the area, settle it, and establish communities.

In a community grant, each settler would receive an allotment of land for a house, an irrigable plot, and the right to "use the remaining unallotted land on the grant in common with the other settlers for pastures, watering places, firewood, and logs for building. . . . [T]he common lands were owned by the community and could not be sold." Malcolm Ebright, Land Grants & Lawsuits in Northern New Mexico 25 (1994).

Charles Beaubien received a private grant from the government conditioned upon settlement requirements. Beaubien,

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[1] As one commentator notes, the themes found in the land tenure and law in Spain and Mexico are repeated in the southwestern United States in the nineteenth century: a tension between private land and communal land, and the importance of Spanish custom. Malcolm Ebright, *Land Grants & Lawsuits in Northern New Mexico* 21 (1994).

in turn, created what I construe to be a community grant to the prospective inhabitants of three plazas. In the Document, he stated that:

> It has been decided that the lands of the Rito Seco remain uncultivated for the benefit of the community members (gente) of the plazas of San Luis, San Pablo and Los Ballejos and for the other inhabitants of these plazas for pasturing cattle by the payment of a fee per head, etc. . . . According to the corresponding rule all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another.

The Document is clear on its face that it pertains to the Rito Seco and intends to convey certain rights to the inhabitants of the three plazas. Beaubien enjoyed private land: he granted communal rights on that land, pursuant to Spanish custom and tradition. Under the Beaubien Document, the settlers received a communal right to use certain lands for their personal needs. Now, the landowners assert rights that their predecessors historically exercised in common with a number of other inhabitants of the area. Those rights are not recognized either by statute or case law.

II. Communal Grants Are Not Recognized In Our Law

A. Territorial Laws

In 1863, the year Charles Beaubien executed the Beaubien Document, under Colorado Territorial law, a document conveying any interest in real estate had to meet several formal requirements, including the requirements that it incorporate an accurate description of the property and the names of the grantees:

> the christian and surnames of the . . . grantees . . . and . . . an accurate description of the premises, or the interest in the premises intended to be conveyed, and shall be subscribed by the party or parties making the

> same, and be duly proved or acknowledged, before some officer authorized to take the proof or acknowledgment of deeds, or by his, her or their attorney in fact.

Territorial Laws of Colo., 1st Sess., An Act Concerning Conveyances of Real Estate, 64, 64, § 2 (1861). The requirement that the document identify grantees by name is indicative of the territorial legislature's overt decision not to honor community grants that failed to mention specific grantees.

The Beaubien Document flatly fails to meet that requirement.[2] The Beaubien Document does not give the christian and surnames of the grantees, instead only referring generally to the "community members" and "inhabitants" of specified villages. That omission is a legal deficiency that makes the document invalid as a conveyance under the operative law.

Compliance with real property law is a matter of substantial importance. *See* IV American Law of Property § 18.27 (A. James Casner ed., 1952) [hereinafter Casner]. In the early years of our history, the questions of who owned what and who could sell what were legitimate and pervasive concerns. As a citizenry, we clearly believed in the sanctity of private property and the ownership rights associated with it. However, we struggled with how to clarify those rights as against those who would dispute them, and how to secure title to property such that it would become marketable to a subsequent purchaser. In fact, in Colorado's early history, one of the issues to which the territorial government fell heir was the question of how to adjudicate land claims and how to establish a common repository for preserving written claims

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[2] The trial court found that in 1856, before he executed the Beaubien Document, Charles Beaubien entered into a lease with the United States government that met all statutory requirements, thereby demonstrating that Beaubien was aware of the requirements for conveying use rights and profits à prendre, and could satisfy them when he chose. *Lobato v. Taylor*, 13 P.3d 821, 830 (Colo.App.2000).

to specific lands. *See* II Colorado and Its People: A Narrative and Topical History of the Centennial State 372-73 (Leroy R. Hafen ed., 1948).

Under the common law, the grantor merely warranted that he was seised of, or possessed of, the title that he purported to convey. The obvious deficiencies of such a system led to the eventual enactment of recording acts and other statutory conveyancing requirements in every state. 2 Cathy Stricklin Krendl, Colorado Methods of Practice § 62.1 (4th ed.1998).

The regulation of property transfer is strictly a matter of state law. Casner, *supra*, § 18.27. As the Supreme Court has noted, "[a]s it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government." *Am. Land Co. v. Zeiss*, 219 U.S. 47, 60, 31 S.Ct. 200, 55 L.Ed. 82 (1911); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) ("It is beyond question that an essential state interest is at issue here: We have said that 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government.'") (alteration in original).

Private property ownership is nothing without a "'bright line rule' to determine the validity of a title and of its potential encumbrances with predictability and without the need for litigation." Michael H. Rubin & E. Keith Carter, Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite, 48 La. L.Rev. 535, 592 (1988).

Our legislature adopted a thorough statutory regime intended to ensure titles to real property are secure and

marketable. *See* §§ 38-34-101 to 38-35-204, 10 C.R.S. (2001). This court, over the decades, has consistently required conveyances to comply with such laws at the time of the document's creation to give full effect to the goal of security and marketability of real property titles. *See, e.g., City of Lakewood v. Mavromatis*, 817 P.2d 90, 96, 101 (Colo.1991) (concluding that, although a city filed and recorded a right-of-way in the road book, because the recordation did not comply with the specific provisions of the 1888 recording statute, the statute in effect at the time of the road petition, it did not give constructive notice to subsequent purchasers; therefore, because the road petition was a transfer of an interest in real property, it had to comply with all the specifications of the applicable recording act); *Hallett v. Alexander*, 50 Colo. 37, 46, 114 P. 490, 494 (1911) ("The evident purpose of the recording statute is, to provide an effectual remedy against the loss accruing to subsequent purchasers of real estate arising from the existence of secret or concealed conveyances thereof unknown to the subsequent purchaser. The remedy is made effectual by requiring every deed to be recorded before it can be of any effect as against such purchasers.").

That a purchaser would know what he is buying by examining the record title to a parcel of real property, and that an owner could be assured that such record title properly evidences every legitimate right that impinges on his fee simple ownership, are matters of no small import. *City of Lakewood*, 817 P.2d at 94 (noting that recording acts serve the important purpose of permitting a purchaser to rely on the condition of title as it appears of record and creating an accessible history of title).

Therefore, very simply, the Beaubien Document, like every other real property transfer, must be held to the standards of the law in effect at the time it was executed in order to protect the certainty and marketability of property interests. The

Document does not comport with those laws, and it, therefore, has no validity as to the landowners here.[3]

The Document intended to create a grant to the members of a community: such a grant was in contravention of the applicable statutes and was, therefore, invalid.

B. Case Law

Just as our statutes do not recognize communal grants, so too, case law reaches the same result. New Mexico has been the location of most of the litigation concerning communal grants in the United States. Over the course of that litigation, those courts have declined to recognize communal grants, and have further determined that they must look to the record title to the property, and not inquire behind it into the traditions or history that might support converting those grants into individual grants:

> [T]he courts established as a basic principle one of not looking behind the title, thus precluding any examination of laws and customs prevailing at the time of annexation by the United States. If title papers were available to prove the right of use, the tribunals treated the land as belonging to the community in fee simple. They also recognized the right of partition of the common lands among the heirs of the original grantees . . . in total disregard of any right of usufruct in descendants of families which had enjoyed the use of the common lands for generations.

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[3] Not only does the Document not identify grantees, but it also omits the words "and heirs and assigns." As the court of appeals noted, the absence of that language in a document conveying an interest in real property meant that the conveyance passed only a life estate. *Lobato*, 13 P.3d at 831 (citing *In re Estate of Newby*, 146 Colo. 296, 299, 361 P.2d 622, 623-24 (1961) (stating that, at common law, without the use of words of limitation "and his heirs and assigns" a conveyance passed only a life estate)).

Ira G. Clark, Water in New Mexico: A History of Its Management and Use 36-37 (1987). Another commentator observed that:

> Because it was considered a real property question, it was left to the New Mexico courts to translate the right of usufruct into common law terms, that is, to define the interest the residents of land grants have in their common lands as opposed to the interest of the patentees. In general, the New Mexico Supreme Court has decided on very narrow legal grounds that the patentees have complete title to the common lands. As a result, the rights of community land grant residents have been damaged and, in some cases, extinguished.

Michael J. Rock, *The Change in Tenure New Mexico Supreme Court Decisions Have Effected Upon the Common Lands of Community Land Grants in New Mexico*, 13 Soc. Sci. J. 55, 56 (1976).

For example, the Tierra Amarilla Grant was a community grant that was patented to an individual, Francisco Martinez. The New Mexico Supreme Court ultimately denied the right of usufruct upon the common lands portion of the grant, holding that, if the land grant were a "private grant, the [Congressional] act of confirmation merely carried out the treaty obligation; if it were a community grant, the common lands were merely government domain and the confirmation constituted a grant de novo to the grantee, Francisco Martinez. Under either view the absolute title was vested, by the act of confirmation in the said grantee." *H.N.D. Land Co. v. Suazo*, 44 N.M. 547, 105 P.2d 744, 749 (1940).

In a successor case in New Mexico concerning the same land grant, the plaintiffs asked the court to legitimize rights based upon language that conveyed "the right to pasture and water livestock, to cut wood and to use the roads upon all the lands, suitable for such purposes, of the entire Tierra Amarilla

Land Grant." *Martinez v. Mundy*, 61 N.M. 87, 295 P.2d 209, 214 (1956), *overruled on other grounds by Evans Fin. Corp. v. Strasser*, 99 N.M. 788, 664 P.2d 986, 989 (1983). The court declined, citing *H.N.D. Land Co.* for the proposition that the original grant conveyed all rights to Martinez and none to the settlers of the region. The court went on to examine the question of whether the plaintiffs had acquired rights by adverse possession and concluded that they had not because "a prescriptive right cannot grow out of a strictly permissive use, no matter how long the use"; and because

> [t]he claim by the appellants that they have acquired by grant or prescription, the right to cut wood, water livestock, pasturage and the use of roads was not shown to have been exclusive to the appellants but on the contrary was claimed by many others. The claim being in common with and similar to that of the general public in this area, the appellants certainly could not acquire a private easement unto themselves.

Martinez, 295 P.2d at 214.

Similarly, in *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967), the Tenth Circuit declined to give legal significance to community rights even in the context of adverse possession. *Id.* at 738-39. That court addressed the acquisition of the same prescriptive profits on the Taylor Ranch that the landowners here claim. In concluding that usage in common by the inhabitants of the area had not vested them with prescriptive profits, the court first noted that "the public cannot acquire by custom or common prescription profits a prendre in another's land." *Id.* at 738; *see also* 3 Herbert Thomdike Tiffany, *Real Property* § 842 (3d ed. 1939 & Supp.2001) (noting that "there can be no prescriptive right of profit in the public"); *id.* § 935 ("[A] right [by the public] to take profits from the land, as distinct from the mere right to use the land, cannot be established by custom, since the effect of such a custom would be to exhaust the profits.").

Finally, the court observed that in dealing with similar claims for profits on land originating from a Mexican land grant, the New Mexico Supreme Court held:

> "The claim by the appellants that they have acquired by grant or prescription, the right to cut wood, water livestock, pasturage and the use of roads was not shown to have been exclusive to the appellants but on the contrary was claimed by many others. The claim being in common with and similar to that of the general public in this area, the appellants certainly could not acquire a private easement unto themselves. All circumstances must be considered in determining the acts that would lead to a prescriptive right and we do not find such acts present in such force as to refer to a prescription."

Sanchez, 377 F.2d at 739 (quoting *Martinez*, 295 P.2d at 214). Again applying Colorado law, the Tenth Circuit held that the use of land for pasturage, natural products, and timber does not ordinarily constitute adverse possession. *Id.* (citing *Smith v. Town of Fowler*, 138 Colo. 359, 367, 333 P.2d 1034, 1038 (1959) ("The pasturage of cattle on unfenced land cannot be regarded as hostile and adverse to the owner of such land.")).

The Tenth Circuit concluded that the landowners' claims were tantamount to an assertion of unlimited equitable ownership and thus inconsistent with Taylor's fee-simple title. *Sanchez*, 377 F.2d at 739.

In short, American legal tradition has chosen to honor private property rights, sometimes to the detriment of communal rights. I have found no court that would recognize the easements that the landowners here urge. Because real property rights depend upon predictability and clarity of law, by attempting to do justice here in contravention of our precedent, we risk injustice elsewhere.

III. The Beaubien Document Cannot Support Implied Rights

A. Ambiguity

The majority does not dispute that the court of appeals correctly applied the applicable laws to the Beaubien Document and agrees that the document cannot act as an express grant of rights. However, it concludes that the Document, coupled with extrinsic evidence, supports an implied conveyance of profits. Maj. op. at ___. I disagree.

Initially, I dispute the conclusion that the court should look to extrinsic evidence at all.[4] However, even considering that extrinsic evidence, I find complete support in the record for the trial court's conclusions that the Document is unambiguous. First, the Beaubien Document is not ambiguous in its legal description as it pertains to the Taylor Ranch. In fact, the Document describes the property as "the lands of the Rito Seco." The lands of the Rito Seco do not include Taylor Ranch. Although the majority asserts that the Document lists uses, specifically, summer grazing, wood, and timber, that are only available in the Taylor Ranch area of the grant, see maj. op. at ___, the trial court made a different factual finding to the effect that the vegetation pattern of the current Taylor Ranch land is identical to that on the land north and adjacent thereto. Further, a witness for the landowners, an architect, land planner, and expert in map generating whose testimony on vegetation the trial court credited, stated that these resources were available throughout

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[4] In *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235 (Colo.1998), we held that Colorado generally follows the "four corners" principle when construing deeds, but conditionally allows extrinsic evidence in some circumstances to determine whether the deed is ambiguous. Specifically, we stated, "'In determining whether a deed is ambiguous, a trial court may conditionally admit extrinsic evidence on that issue, but if it is ultimately determined that the document is unambiguous, the conditionally admitted evidence must be stricken.'" *Id.* (quoting *O'Brien v. Vill. Land Co.*, 794 P.2d 246, 249 n. 2 (Colo. 1990)).

the mountainous areas of the Sangre de Cristo grant, not solely on the Taylor Ranch, which occupies only a small portion the grant.[5] The trial court considered evidence bearing on the location of the landowners' use of timber, firewood, and grazing and concluded that: "The evidence clearly established that none of these locations [lands of the Rito Seco] are situate on the land owned by the defendant." *See also Sanchez,* 377 F.2d at 737 (stating that the Beaubien Document made no mention of land located on the Taylor Ranch);[6]

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[5] Specifically, the witness testified that there are large timbered portions of the grant that are not located on the Taylor Ranch. Later in the trial, the witness, while being examined by the defense, testified regarding the area in the grant located to the north of the Taylor Ranch:

> Q. [The area north of the Taylor Ranch] is vegetated in almost the same manner as you've depicted vegetation on the Taylor ranch, isn't it?
>
> A. Yes, the same general patterns would tend to be contiguous.
>
> Q. And carry on farther north; is that fair to say?
>
> A. Yes.
>
> Q. So, would it be fair to say that the line that the line dividing the north side of the Taylor ranch from the lands to the north of that line are indistinguishable?
>
> A. Well, it would be basically a continuation of the vegetation.
>
> Q. Okay. So, one could put to use the lands north of the north boundary of the Taylor ranch in the same fashion that you could put use to the Taylor ranch, itself; is that fair to say?
>
> A. Yes.

[6] The court in *Sanchez* reasoned that the Beaubien Document must be limited to the lands it specifically references, which lands do not include the Taylor Ranch property. The only other option would be to apply it to the entire grant, which would be inconsistent with Beaubien's intent. *Sanchez*, 377 F.2d at *738.* The court stated:

> We agree with the trial court that to construe the instrument as a dedication of the lands to the extent claimed by the appellants would be inconsistent with the contemplated sale of the lands remaining unsold at the time, and to apply it only to the [Taylor Ranch] would

Lobato, 13 P.3d at 831 (concluding that "it is undisputed that the specific locations referenced in the document are not on defendants' property."). The majority acknowledges the trial court's finding that the only locations specified in the Beaubien Document are not located on the Taylor Ranch. Maj. op. at ___. Hence, the Document is not ambiguous in its legal description.

Similarly, there is no ambiguity in the failure of Beaubien to mention individual grantees' names. As I discuss above, he intended to create a communal grant for the benefit of the inhabitants of the three plazas.

Accordingly, I find no basis for viewing the Document as an incomplete or flawed conveyance that can give rise to implied rights.

IV. Easements

In any event, the three legal theories advanced by the majority for the creation of an easement are not supported by the facts.

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require a rewriting of the instrument. None of the settlers, including these defendants, have ever, and do not now, assert any privileges for the use of lands after sale and occupancy by the purchasers. Apparently the conflict arose when the sale to Taylor ended the free use of the lands in the area for pasture, wood, and recreational uses. The hardship caused, however, does not establish a legal right.

By the terms of the agreement between Gilpin and the executors of Beaubien's estate, Gilpin undertook to carry out certain commitments which Beaubien had made to settlers during his lifetime. Essentially, this is a commitment to convey title to certain settlers upon receipt of agreed payments. There is no language in the agreement which could be construed as indicating that either Beaubien or Gilpin intended the dedication which appellants seek to establish.

Id.

A. Easements Versus Profits À Prendre

I begin with the proposition that I view the distinction between profits a prendre and easements as material. Although in preparing the Restatement of Property, the American Law Institute (ALI) initially referred to both easements and profits as "easements," in 1998 the ALI reversed its position, once again finding the distinction between easements and profits significant. *See 4* Richard R. Powell, *Powell on Real Property* 34.01[2] (2002). As the majority noted, the Restatement (Third) of Property: Servitudes § 1.2(2) (2000) [hereinafter Restatement] defines a profit a prendre as "an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another. It is referred to as a 'profit' in this Restatement." The Restatement distinguishes between easements and profits stating "[p]rofits a prendre are like affirmative easements in that they create rights to enter and use land in possession of another. However, they also create the right to remove something from the land." Restatement, *supra*, § 1.2(2) cmt. (a). It further clarifies, "*Profits are easements plus.* Profits are easements (rights to enter and use land in the possession of another) plus the right to remove something from the land." Restatement, *supra, §* 1.2(2) cmt. (e) (emphasis in original).

Thus, the Restatement acknowledges that profits a prendre provide a greater property interest to the profit holder and, conversely stated, a greater detriment to the servient estate. *See* 8 David A. Thompson, *Thompson on Real Property* § 65.03(a) (1994) (noting, "Despite the fact that profits are now considered by most writers to be governed by the same set of rules as easements. . . . [i]t is also clear that functionally the two areas deal with distinctly different kinds of transactions." Thompson also observes that, in the Restatement (Third) of Property introduction (Tentative Draft No. 1, 1989), the ALI highlighted that "[t]he term profit has been

resurrected from the oblivion into which it was consigned by the 1944 Restatement because it describes a device that is used for a purpose quite different from the other servitude devices, and occasionally calls for somewhat different considerations, if not different rules.").

Similarly, we have held that profits a prendre involve a greater interest than easements and must therefore be expressly granted. *Alexander Dawson, Inc. v. Fling*, 155 Colo. 599, 603-04, 396 P.2d 599, 601 (1964) (holding that a profit a prendre must be expressly granted and cannot be implied from an easement). Hence, under Colorado law, because profits a prendre are more onerous to the burdened estate than an easement,[7] the importation of laws governing easements is inappropriate.

B. Easements by Prescription

Under Colorado law, an easement by prescription requires a showing of hostile use, without permission of the owner. The Restatement suggests that easements by prescription can also arise out of a permissive, imperfectly created servitude. This court has never previously adopted that section of the Restatement and these facts do not warrant such a step.

The Restatement, *supra*, § 2.16 allows a prescriptive easement to arise out of a use that began as permissive, under the terms of an imperfect conveyance. The section specifies:

> A prescriptive use of land that meets the requirements set forth in 2.17 creates a servitude. A prescriptive use is either
>
> (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or

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[7] As a more minor point, I would also observe that the right to graze cattle is probably a profit à prendre coupled with an easement, for it is the right to make some particular and continuing use of property as well as to remove something from it.

> (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

Restatement, *supra*, § 2.16 cmt. (a) announces that prescription operates in two separate factual situations. The first situation is a matter of settled law and occurs when the use of the land is without the consent of the owner. *See also id.* § 2.17 cmt. (c) ("In the most common situation, the prescriptive use is made without the consent of the servient owner."). Restatement, *supra*, § 2.16 cmt. (f) further states that to be adverse a use must create a cause of action for interference with an interest in property like trespass, nuisance, or interference with a servitude benefit. To fulfill the definition, the use must be made without authority and without permission of the property owner. *Id.; see also Smith v. Town of Fowler*, 138 Colo. 359, 367, 333 P.2d 1034, 1038 (1959) ("'An adverse claim must be hostile at its inception, because, if the original entry is not openly hostile or adverse, it does not become so, and the statute does not begin to run as against a rightful owner until the adverse claimant disavows the idea of holding for, or in subservience to another, it actually sets up an exclusive right in himself by some clear, positive and unequivocal act.'"). Uses made pursuant to licenses are not adverse. Restatement, *supra*, § 2.16 cmt. (f). Similarly, uses made pursuant to servitudes created expressly, by implication, or by necessity, are not adverse.[8]

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[8] Restatement, *supra*, § 2.16 cmts. (f) and (g) further provide:

> Uses made in subordination to the property owner are not adverse, even if the property owner has not given permission, and the use is not otherwise authorized. The reason is that the property owner is not put on notice of the need to take steps to protect against the establishment of prescriptive rights. . . .
>
> . . . Subordination requires that the user act with authorization, express or implied, from the landowner, or under a claim that is

As to the second factual scenario, the Restatement of Property: Servitudes (1944) did not contain the possibility of creating a prescriptive right through an intended but imperfectly created servitude. The earlier Restatement provided: An easement is created by such use of land, for the period of prescription, as would be privileged if an easement existed, provided the use is (a) adverse, and (b) for the period of prescription, continuous and uninterrupted. Restatement of Property: Servitudes § 457 (1944). It further specified: A use of land is adverse to the owner of an interest in land which is or may become possessory when it is (a) not made in subordination to him, and (b) wrongful, or may be made by him wrongful, as to him, and (c) open and notorious. *Id.* § 458.

The ALI did not return to the subject of servitudes until the creation of the Restatement Third. Restatement, *supra*, fwd. The Restatement (Third) of Property introduction (Tentative Draft No. 3, 1993) explains that the creation of the second portion of the Restatement was precipitated by a desire to provide a more satisfactory theory to resolve cases involving common drives and party walls than adverse possession, because under adverse possession, the time for asserting legal claims to recover the possession of land would be limited.

The Restatement proposes that uses involving common driveways, boundary fences, dams, and party walls are ineptly suited to the requirement of adversity because, in

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> derivative from the landowner's title. . . . When a property owner gives permission to use property, the law implies that a license was intended. Unless additional facts suggest otherwise, it is assumed that the parties intended that the property owner retain the right to revoke the license at any time. Permissive uses do not give rise to prescriptive rights.
>
> . . . .
>
> A use that is initially permissive can become adverse only by express or implied revocation or repudiation of the license.

these situations, the initial use is permissive and equity demands the continued right to use the common facility; therefore, the Restatement proposes to dispense with the requirement of adversity but otherwise adopt adverse possession law for those circumstances. *See* Restatement, *supra*, § 2.16 cmt. (a). The Comment suggests that it makes sense to assume that when the parties begin a joint-use arrangement, they intend to create mutual servitudes rather than licenses. *Id.* § 2.16 cmt. (i).

In addressing whether a use that is made pursuant to the terms of an intended but imperfectly created servitude results in a prescriptive easement, only the Michigan Court of Appeals has adopted the second scenario set forth by the Restatement. *Plymouth Canton Cmty. Crier, Inc. v. Prose*, 242 Mich.App. 676, 619 N.W.2d 725, 730 (2000) (finding that where the parties executed an express easement that did not fully articulate the parties' intent to permit loading activities, and those activities occurred under the mistaken belief that the express easement permitted them, the use created a prescriptive easement).

Hence, the Restatement section would allow for claims of prescriptive use to be made in circumstances in which a document conveyed certain rights, but did so imperfectly, and the possessor wishes to validate those rights even through periods when he was making use with permission. The Restatement would itself limit application of the section primarily to common wall or driveway cases.[9]

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[9] The comment to the Restatement assumes that in cases not involving common driveways, party walls, or other joint-use facilities, the parties will affirmatively express their respective intent to create a servitude. *See* Restatement, *supra*, § 2.16 cmts. (h) & (i). It contemplates two applicable situations in which prescription may cure a defect in title in non-common-facility contexts. The first involves uses pursuant to express servitudes that were not in full compliance with the Statute of Frauds. *Id.* § 2.16 cmt. (h). The comment notes that since the intent to create a servitude is

The section is not consistent with Colorado law. First, it is not consistent with the statutes, which provide that adverse possession occurs only if the use claimed is truly adverse.[10]

Second, it is not consistent with our case law. This court has consistently held that the same requirement of adversity applies to acquiring easement and profit rights by prescription as to the acquisition of title by adverse possession. *See, e.g., Town of Silver Plume v. Hudson*, 151 Colo. 394, 398, 380 P.2d 59, 61 (1963) (holding that to establish a prescriptive easement the "'possession must be hostile, not only against the *true owner,* but against the world as well. An adverse claim must be hostile at its inception, because, if the original entry is not openly hostile or adverse, it does not become so, and the statute does not begin to run as against *a rightful owner* until the adverse claimant disavows . . . a holding by permission.'") (emphasis in *Silver Plume*); *Rivera v. Queree*, 145 Colo. 146, 149, 358 P.2d 40, 42 (1960)(holding that the prerequisites to acquiring a prescriptive easement are the continuous, open, and adverse use of the right of way for the statutory period); Krendl, *supra*, § 65.5(3.1) ("In Colorado, the law of prescription has become an extension of the doctrine of adverse possession, requiring all the elements thereof."). Thus, the adoption of the second prong of the Restatement test, which can create a prescriptive right in the context of permissive, consensual use is contrary to our law, and I would decline to engraft it.

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clear from the writing and the beneficiary is obvious, these cases do not present factual difficulties. The second scenario contemplates cases involving a claim of prescriptive use based on oral grants or agreements to create a servitude. *Id.* It directs that such claims should only be accepted cautiously because "they directly thwart the purpose of the Statute of Frauds to force parties to provide written evidence of the existence and terms of the interests in lands." *Id.*

[10] § 38-41-103, 10 C.R.S. (2001).

Even if the court adopts the doctrine, the facts of this case do not support its application here. The Beaubien Document is not an imperfectly created servitude. It is a clearly created communal grant to lands within a particular area. The majority's application of the second prong is not merely curing a small defect in an express agreement, as contemplated by the Restatement. We are dealing with a document that was quite clear in its intent and application; however, it is not enforceable at law. In such circumstances, the second prong of the Restatement, even if applied, would not support the creation of prescriptive rights.

C. Easements by Estoppel

I would also decline to apply principles of easement by estoppel, because there is no showing here of misrepresentation or concealment of material facts by Beaubien or any of his successors in interest. Thompson defines the elements for an easement by estoppel as:

> (1) conduct, acts, language or silence amounting to a representation or concealment of material facts; (2) the party to be estopped either knows the facts or the circumstances require the facts to be imputed to that party; (3) the truth about the facts must be unknown to the party claiming benefit of the estoppel at the time they were acted upon; (4) the conduct must occur with the intention or expectation that it will be acted upon, or under the circumstances that it is both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party, and, thus relying, the other party must be led to act upon it; and (6) the other party must in fact act upon the conduct and change position for the worse.

7 Thompson, *supra*, § 60.03(b)(3).

In Colorado case law, easement by estoppel can sometimes arise out of a parol agreement that intends to convey a certain

right as a mere license; however, there must be conduct on the part of the party against whom the easement is being asserted that amounts to a false representation or concealment of material facts. *Pagel v. Reyman*, 628 P.2d 166, 168 (Colo.App.1981) (holding that the plaintiffs failed to establish the elements for an easement by estoppel in a case involving a road easement for a trailer park) (citing *Aubert v. Town of Fruita*, 192 Colo. 372, 374-75, 559 P.2d 232, 234 (1977)).[11]

The majority relies upon two cases for the proposition that the facts before us in this case support an easement by estoppel. Both are water cases, and both deal with the acquisition of ditch rights by parol agreement. Both are inapposite, in my mind, because they are predicated on the underlying policy that is expressed as follows:

> It is indeed a generally prevailing state policy in those states dependent upon irrigation largely for successful agriculture, both in the interest of economy and to prevent any unnecessary waste of land in the construction and use of ditches, that, where one ditch can answer the purpose of more, the right to use the same ditch is granted to others than the owners.

Hoehne Ditch Co. v. John Flood Ditch Co., 68 Colo. 531, 540-41, 191 P. 108, 112 (1920). In both cases, *Hoehne* and *Graybill v. Corlett*, 60 Colo. 551, 553, 154 P. 730, 731 (1916), the court permitted the establishment of a ditch right-of-way by estoppel without the necessary element of misrepresentation of a material fact, but only in the context of

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[11] *Aubert is* a case involving the assertion of senior water rights. The court declined to fmd that the defendant was estopped from claiming the rights, relying for the principles of estoppel upon a real property ownership case. *Jacobs v. Perry*, 135 Colo. 550, 555-56, 313 P.2d 1008, 1011-12 (1957) (defendants claimed that the titled owners to the property were estopped from contesting their rights because the owners had accepted the benefit of improvements on the property).

water rights. To the contrary, in *Bijou Irrigation District v. Empire Club*, 804 P.2d 175, 185-86 (Colo.1991), we declined to permit the petitioners from asserting that the Irrigation District was estopped from objecting to use of a reservoir for recreational purposes because, although the District had knowledge of the facts, there were no findings regarding unreasonable delay in the assertion by the District of its rights. Also on point is *Holbrook Irrigation District v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 42 F.2d 541 (D.Colo.1929), in which the plaintiffs sought certain water rights by operation of estoppel. The court there noted that equitable estoppel requires overt acts and declarations of the party charged, designed to induce another to alter his position to his detriment all of which must be proven by clear and convincing evidence. *Id.* at 548.

There has been no showing in this case that Beaubien or Gilpin either misrepresented material facts or intended the landowners to rely to their detriment upon a parol agreement. Indeed, to my knowledge, the only context in which such a doctrine has been applied to the acquisition of easements has involved ditches and ditch rights, an area in which rights are so firmly entrenched as to be included within the Colorado Constitution.[12]

D. Easements by Prior Use

Easements by prior use, sometimes referred to as easements of necessity, can be implied when a property owner has used one part of a single piece of property for the benefit of another part of the property and then divides and conveys the property. In those circumstances, the new possessor of "the previously benefited portion of the land may also possess an easement over the previously burdened part of the property." 7 Thompson, *supra*, § 60.03(b)(4).

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[12] Article XVI, section 7 of the Colorado Constitution establishes the right of all persons and corporations for rights of way to convey water.

Thompson suggests that the elements of an easement implied from prior use are: "(1) common ownership followed by a conveyance separating the unified ownership; (2) before severance, the common owner used part of the property for the benefit of the other part, a use that was apparent, obvious, continuous and apparent; (3) and the claimed easement is necessary and beneficial to the enjoyment of the parcel previously benefitted." 7 Thompson, *supra*, § 60.03(b)(4)(i). The underlying premise is that, because the retained property was necessary to enjoyment of the conveyed property as shown by historical use—the grantor must have intended to convey the easement with the grant.

In *Wagner v. Fairlamb*, 151 Colo. 481, 379 P.2d 165 (1963), the plaintiff constructed a road across the defendant's property that followed a mule pack or wagon trial that was in existence when the property was under common ownership. *Id.* at 483, 379 P.2d at 167. This court recognized that an easement may be an express easement (which appears in a deed or contract for the sale of land) or an implied easement (which arises out of the existence of certain facts implied from the transaction). *Id.* at 484, 379 P.2d at 167. The court noted that implied easements have generally not been looked upon with favor by the courts. *Id.* The elements adopted by the court to prove an implied easement were:

> (1) Unity and subsequent separation of title; (2) obvious benefit to the dominant and burden to the servient tenement existing at the time of the conveyance; (3) use of the premises by the common owner in their altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) necessity for the easement.

Id. at 484-85, 379 P.2d at 167. Noting that all four elements must be present to support the creation of an easement, the court in *Wagner* rejected an easement, finding that the use was "a terminated intermittent" rather than

permanent use. *See also Lee v. Sch. Dist. No. R-1*, 164 Colo. 326, 332, 435 P.2d 232, 236 (1967) (easement by necessity found because of adequate proof of consistent, permanent use of road prior to severance).

In *Bromley v. Lambert & Son, Inc.*, 752 P.2d 595 (Colo. App.1988), at the time of the severance of the parcel, the plaintiffs had no access to their land except by right of way over the defendant's property. *Id.* at 596. The city later constructed a public street adjoining the plaintiffs' property. *Id.* The court stated:

> Colorado recognizes implied easements that arise by pre-existing use. A showing of necessity is required to establish an easement by pre-existing use. Proof of necessity is required as of the time of the severance of the original property into separate estates, because it is an indication of the intent of the original grantor and grantee that a permanent servitude be imposed on the servient estate in favor of the dominant estate.

Id. (citations omitted); *see also Proper v. Greager*, 827 P.2d 591 (Colo.App.1992) (noting that the required necessity is the necessity for the easement at the time of severance, not at the time of the court hearing).

Accordingly, to imply an easement by prior use, the landowners here would have had to show that the mountain property was being used *by Beaubien* at the time of the conveyance of the vara strips as a necessary adjunct in order to support the viability of the vara strips. Only by that means could the landowners demonstrate that Beaubien necessarily intended to grant to them such rights. The evidence does not suggest that Beaubien was then making use of the property nor that Taylor Ranch was necessary to the community. Rather, the evidence demonstrates that no one lived on the property at the time of the grants, and that the grazing, timber, and firewood use occurred on property other than the Taylor

Ranch. Under those circumstances, an easement by necessity cannot exist.

V. Conclusion

I do not believe that the landowners here have established their right to use the Taylor Ranch lands as they claim. They cannot, in my view, rely upon the Beaubien Document because it did not comply with the laws in effect at the time of its execution by failing to identify specific grantees. The document was not ambiguous, and therefore cannot support rights by implication. Further, none of the theories for implication of an easement apply to these facts.

Accordingly, I would affirm the court of appeals and thus respectfully dissent from the majority opinion.

I am authorized to state that Justice RICE joins in this dissent.

APPENDIX C

SUPREME COURT OF COLORADO
EN BANC

No. 92SC74

APOLINAR RAEL, Rosendo Martinez, Joseph E. Medina, Daniel Sequra, Gilbert Medina, Loyola Medina, Juan LaCoombe, Bonnie Lobato, Walter Vigil, Eugene Lobato, Rudy Montoya, Clorindo Martinez, Adelmo Kaber, Emilio Lobato, Leandardo Medina, Alfanzo Medina, Rupert Gallegos, Gloria Gallegos, Robert Atencio, Frank Sanchez Bentura Roybal, S.R. Sanchez, Leonides Atencio, Cruicito Maez, Henry Lobato, Vernon Sanchez, Ruben Herrera, Billy Alire, Willie Alire, Richard Garcia, Eppy Quintana, Willie Ray Montoya, Pete E. Espinoza, Raymond J. Maestas, Bobby Maestas, Shirley Romero, Marvin Medina, Manuel Gardunio, Leonardo Martinez, Tonita Garcia, Orry Medina, Raymond Garcia, Floyd R. Solan, Adolph J. Lobato, Presentacion Lobato, Elesam Santistevan, Raymond N. Medina, Agatha Medina, Juan DeHerrera, Hubert J. Martinez, Emejido Vialpando, Joe P. Vigil, Larry J. Vigil, David Martinez, Charlies Jaquez, Jr., Ervin L. Vigil, Manuel Maestas, Pete Lobato, Anthony Sanchez, Emilio DeHerrera, Jose F. Lobato, Eugene Sanchez, Gerald Sanchez, Lawrence Vialpando, Bonnie Sanchez, Jose G. Sanchez, Elmer Manuel Espinoza, James Sanchez, Gilbert Herrera, Robert Romero, Carlos Lobato, Andres Montoya, Bert Maestas, Henry Rodriguez, Michael J. Vigil, Jose R. Torres, Manuel Vigil, Evan Sanchez, Solestiano Martinez, Rufino Sanchez, Arnold Valdez, Caroline Taylor, Martha Vialpando, Mark Martinez, Jesse Martinez, Ruben

Gallegos, Joe A. Gallegos, Moises Gallegos, Margarito Espinoza, Sam Valdez, Jose F. Carson, Ronald A. Sandoval, Daniel Martinez, Frances D. Berggran, Maria Jaquez, J.R. Jaquez, Alberto Quintana, Jeffrey Jaquez, Frank Olivas, Gertrude C. Olivas, individually and as representatives of the Class of Heirs and successor in interest to the original settlers of the Sangre de Cristo Grant,

Petitioners and Cross-Respondents,

v.

ZACHARY TAYLOR, as Executor of the Estate of Jack T. Taylor, Jr., Deceased,

Respondent and Cross-Petitioner.

May 2, 1994.
As Modified on Denial of Rehearing
July 25, 1994.

Justice KIRSHBAUM delivered the Opinion of the Court.

In *Rael v. Taylor,* 832 P.2d 1011 (Colo.App.1991), the court of appeals affirmed a judgment entered by the Costilla County District Court in favor of the respondent, Zachary Taylor, executor of the estate of Jack T. Taylor, Jr.,[1] against the petitioners, 100 persons claiming usufructuary rights in a parcel of land consisting of approximately 77,500 acres located in Costilla County, Colorado (the "Mountain Tract").[2]

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[1] Jack T. Taylor, Jr., died during the pendency of the trial court proceedings. He and his executor will be referred to as "Taylor" throughout this opinion.

[2] The second amended complaint (hereafter "the complaint") lists 110 persons as petitioners. The caption of the court of appeals' decision lists 100 persons as appellants.

The trial court held, *inter alia,* that in view of the decision in a federal court Torrens Act proceeding filed by Taylor in 1960 (the 1960 Torrens action), the petitioners' claims were barred by the doctrine of res judicata and by certain statutes of limitation.[3] The court of appeals also affirmed the trial court's denial of Taylor's request for attorney fees. Having granted certiorari to review the court of appeals' judgment, we affirm in part, reverse in part, and remand the case to the court of appeals with directions.

I

In 1844, Narcisco Beaubien and Stephen Luis Lee received a land grant (the Sangre de Cristo Grant) from the then Mexican governor of New Mexico, of approximately 1,000,000 acres of land located to a large extent in the central southern portion of Colorado. After Beaubien and Lee were killed in 1847, Narcisco Beaubien's father, Carlos, inherited his son's undivided one-half interest in the property and purchased the remaining interest from Lee's estate.

Following the Mexican-American War, the 1848 Treaty of Guadalupe Hidalgo transferred sovereignty over the Sangre de Christo Grant property to the United States. In 1860, the Congress of the United States adopted a recommendation by the United States Surveyor General to confirm that Carlos Beaubien owned the land, and Carlos Beaubien was issued a patent for the land in 1880.

Prior to 1860, Carlos Beaubien had sold numerous small parcels of the land to various settlers. On May 11, 1863, he executed and recorded a document written in the Spanish language that described, *inter alia,* usufructuary rights for wood, timber, water, and pasture of the residents of certain

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[3] At trial, the respondent asserted as defenses and as grounds for the entry of summary judgment, *inter alia,* that the action was barred by § 38-41-101, 16A C.R.S. (1982); § 38-36-132, 16A C.R.S. (1982); and/or § 38-41-108, 16A C.R.S. (1982).

towns located within the boundaries of the property. The document, translated, provides in pertinent part as follows:

> Town of San Luis of the Culebra, May 11, 1863 Book 1, Page 256
>
> It has been decided that the Rito Seco lands shall remain uncultivated for the use of the residents of San Luis, San Pablo and the Vallejos, and other inhabitants of said towns, for pastures and community grounds, etc. And that the Rito Seco waters are hereby distributed among the said inhabitants of the town of San Luis, and those on the other side of the Vega, whose lands lie in the vicinity and cannot be irrigated by the water of the Rio Culebra. After measuring off three acres in front of the Church, which are hereby donated to it, the Vega shall be for the use of the inhabitants of this town and of the others up [unintelligible] the Vallejos Creek and also for the benefit of those who may in the future, settle on the Gregorio Martin Creek (San Francisco) from the road down to the narrows. It is understood that the lots shall run East and West, 50 varas, and never North and South and no one shall have a right as they might have thought, to place any obstacles or hindrances to interfere with the rights of others. The regulations as to roads shall be also observed so as to allow every one to have access to his farm lands. Also, in using the water, care shall be taken not to cause damage to any one.
>
> All the inhabitants shall have the use of pasture, wood, water, and timber and the mills that have been erected shall remain where they are, not interfering with the rights of others. No stock shall be allowed in said lands, except for household purposes. All those who come as settlers shall agree to abide by the rules and regulations and shall help, as good citizens and be provided with the necessary weapons for the defense of the settlement.

TWO WITNESSES (Signed) Carlos Beaubien

Carlos Beaubien died in 1863. On April 7, 1864, pursuant to an oral agreement Carlos Beaubien made prior to his death, his heirs conveyed all the unsold Sangre de Christo Grant property to William Gilpin. The instrument of conveyance contained the following "express condition":

> [C]ertain settlement rights before then conceded by said Charles Beaubien to residents of the settlements of Costilla, Culebra & Trinchera, within said Tract included, shall be confirmed by said William Gilpin as made by him, the said Charles Beaubien during his his [sic] occupancy of said Tract and as understood and agreed by and between him and said settlers. and sale & conveyance and title be made to the parties lawfully, and title thereto on compliance on their part with the terms by them entered into, of which parties so entitled a list marked A. accompanying this agreement and is annexed to and made a part hereof [sic]. Now therefor this agreement and obligation in its full intent, meaning & object and under the liabilities assumed in the covenance and agreements in the same contained, is made to secure the specific performance of the obligations & liabilities of the said Charles Beaubien on the part of said William Gilpin and to perfect the right of said parties entitled as aforesaid in accordance with the conditions of the said Charles Beaubien entered into, and all of which are hereby said William Gilpin recognized and confirmed.

Between 1864 and 1960, Gilpin and his successors in interest sold most of the remaining property. In 1960, Taylor purchased one of the few remaining large parcels. Known as "the Mountain Tract," the parcel consisted of some 77,500 acres of undivided and unfenced land located in Costilla County, Colorado, southwest of San Luis, Colorado, containing significant timber, grazing, water, and wildlife

resources. Taylor's deed to the Mountain Tract contains the following pertinent provisions:

> All of the land hereby conveyed being subject to rights of way of record and all rights of way heretofore located and now maintained and used on, through, over, and across the same; and also subject to claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlements [sic] rights in, to and upon said land, but not subject to rights granted by the party of the first part or its predecessors from and after January 1, 1900; and also subject to taxes for the year 1960 and subsequent years, and existing leases, if any.

On September 1, 1960, shortly after purchasing the Mountain Tract, Taylor filed a petition in the United States District Court for the District of Colorado[4] to register title in this land as provided for in Colorado's 1953 Torrens Title Registration Act, sections 118-10-1 to -102, 5 C.R.S. (1953).[5] *Taylor v. Jaquez,* Action No. 6904 (D.Colo. Oct. 5, 1965). The application listed over 300 individuals as interested parties and referred to other persons "having or claiming any estate, interest or claim in law or equity in possession, remainder, reversion or expectancy in said land," as follows:

> [A]ll other persons similarly situated who claim certain settlement rights under that certain instrument executed by Carlos Beaubien and recorded in Book 1, page 256 of the Costilla County Records and purporting to grant unto the people of San Luis, San Pablo and the Ballejos, dwelling and pasture rights on the lands of the Rito Seco, and also all persons claiming under a certain deed

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[4] Because Taylor was a North Carolina resident, the federal court had diversity jurisdiction over this state-law-based action pursuant to Title 28 U.S.C. § 1332. *Sanchez v. Taylor,* 377 F.2d 733, 736 (10th Cir.1967).

[5] The Torrens Act is currently codified at §§ 38-36-101 to -198, 16A C.R.S. (1982 & 1993 Supp.).

> executed by Frederick Miller and Jesus Abreau as executors under the Will of Carlos Beaubien wherein certain settlement rights were confirmed by William Gilpin, the purchaser thereunder, said deed referring to the settlements of Costilla, Culebra and Trinchera, and the settlers to whom such rights accrued were named in a list marked "A" purportedly attached to said deed but which said list has never been found and settlers remain unidentified.

The application also contained the following averments:

> [S]aid persons listed under the instruments above have no rights because said instruments refer to the lands of the Rito Seco [sic], which lands are not within the boundaries of petitioner's land and further, since no list of settlers has ever been found, said confirmation by William Gilpin is of no effect since it runs to no ascertainable persons.

Pursuant to section 38-36-113 of the Torrens Act, the trial court appointed W.W. Platt as examiner of titles. Platt ultimately filed a "Certificate of Opinion on Title to Mountain Tract" that contained the following pertinent statements:

> The same Claims to these alleged pasture and wood rights have been asserted in an action to quiet title to adjoining land now pending in the District Court of Costilla County. I am one of the attorneys for the plaintiff in this action. Attorney E.E. Romero of Taos, New Mexico, appears as principal attorney for the defendants therein. I have tried to learn from him the names of the persons who claim these rights and the extent of such claims, but he has told me that he has tried to get this information from his clients but has been unable to do so. I have recently asked Mr. Amadeo Vigil, who is very active in the affairs of the above mentioned Association,[6] for a list of these claimants

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[6] The report describes this association as "an unincorporated organization called the `Association of Civic Rights.'"

and he has told me that no such list has ever been made but that the claims are made on behalf of all owners of land in Costilla County. Paragraph Sixth [sic] in the Petition in this action names 316 persons as persons claiming interests in this land. Only 47 of these names appear in the abstract of title, and the attorneys for petitioner inform me that the other 269 names on the list are names of persons whose only possible interest in The Mountain Tract would be as landowners in Costilla County claiming such rights to pasture and wood solely because they are such landowners.[7]

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[7] The record indicates that at the time Taylor filed his Torrens action, the names of some 886 landowners appeared on the tax rolls for the towns of San Luis, San Pueblo/San Pedro, Chama and San Acacio, the towns closest to the Mountain Tract. In a deposition taken in November 1982, in the instant case, an attorney retained by Taylor prior to the filing of the 1960 Torrens action stated that "[w]e have attempted to name everybody who had ever asserted any claim to any of these rights on the Taylor land." The attorney indicated that he did not remember or know how the names of the persons specifically identified were selected, but stated that no attempt was made to name all of the property owners in Costilla County. On January 13, 1949, this attorney wrote a letter addressed to "The residents of the Vega Lands," which contained the following statements:

> In 1936, Mr. Albert L. Moses gave an opinion to Mr. J.J. Valdez and Mr. J.E. Sanchez that the owners of land in the Grant who obtained their title through those originally settling the land have the right to go upon the timbered portions of the Grant and take therefrom the necessary fire wood for their own personal uses and the necessary timber for use in connection with the land which they own (but not for sale), and likewise have the right to pasture their own domestic animals, not by herding them upon the land but by permitting them to graze thereon.
>
> We still believe that this is the case and that you would have the right to stop anyone who interferes with these rights.

The attorney stated in his deposition that the term "Vega" refers to a piece of land that was "either near or adjacent to the town of San Luis" and was used for pasture but not used for timbering.

On December 22, 1960, after receiving Platt's report and Taylor's election to proceed, the court ordered the clerk of the court to issue summonses to all named defendants and to publish notice for non-resident defendants and "'all such unknown persons or parties' in the *Free Press,* a newspaper of general circulation published in Costilla County, Colorado, once in each week for six consecutive weeks."

On January 20, 1961, attorneys Sam Taylor and Eliu E. Romero entered their appearance on behalf of all the named defendants. On May 2, 1961, an answer was filed which, according to its terms, was filed "by the defendants" and was signed by the two attorneys as attorneys "for defendants." The answer asserted that the defendants possessed usufructuary rights and rights of prescription in lands in the Mountain Tract.

On February 14, 1962, Taylor mailed interrogatories to each of the then-named defendants. Attorneys Sam T. Taylor and Eliu E. Romero subsequently entered their appearances on behalf of an additional 133 defendants, and on March 5, 1962, the trial court ordered Taylor to mail interrogatories to these additional defendants.

On May 9, 1962, Taylor filed a motion to require all defendants to answer the interrogatories within thirty days. The motion was granted. On June 19, 1962, Taylor moved for entry of default against all named defendants who had not filed answers to the interrogatories. After a hearing, the trial court extended the deadline for answering the interrogatories to July 20, 1962. On that date, attorney Alfred Craddock entered an appearance on behalf of nine additional persons and requested an order permitting these additional defendants to answer Taylor's interrogatories.

On July 31, 1962, the trial court entered default judgments against 369 named defendants for failure to file timely answers to Taylor's interrogatories. The court's order stated

that answers had been received from 103 defendants and granted the nine defendants represented by Craddock an extension of time within which to answer the interrogatories. Those nine defendants did file such answers.

On January 14, 1963, Taylor filed a motion for summary judgment against the 112 defendants who had answered his interrogatories.[8] The motion contained the following statement:

> [Taylor] is the owner, by purchase, of such land under deed dated February 15, 1960; by virtue of such purchase and mesne conveyance from the original patentee, he is the owner of the fee simple absolute title thereof. [Taylor] and his predecessors in title have maintained continuous possession of the subject land and have exercised complete dominion over it since the issuance of the original grant from the Mexican government, have continuously paid the taxes on said land and have maintained sole and exclusive use and occupation thereof.

The trial court denied the motion with respect to the claims asserted by the defendants for individual rights by prescription, but granted the motion with respect to the defendants' claims of common usufructuary rights in the Mountain Tract. After a bench trial, the trial court determined that the defendants owned no prescriptive rights in Taylor's property and entered a "Final Decree on Confirmation of Title and Registration" pursuant to section 38-36-130 of the Torrens Act.

On appeal, the Tenth Circuit Court of Appeals held that the 1860 congressional confirmation of the Sangre de Cristo Grant extinguished "any conflicting rights prior to the confirmatory Act of 1860 which might have arisen or existed

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[8] The motion did not request entry of judgment against named defendant Board of County Commissioners of Costilla County.

by reason of the original grant from Mexico, considered in light of Mexican law and the Treaty of Guadalupe-Hidalgo . . . ." *Sanchez v. Taylor,* 377 F.2d 733, 737 (10th Cir.1967). The court further held that neither the Beaubien document nor the agreement between his heirs and Gilpin evidenced a clear intent to establish or recognize a "dedication" of the usufiuctuary "privileges" the defendants sought to establish.[9] *Id.* at 737-38. The court affirmed the trial court's determination that none of the individual defendants owned prescriptive rights in the Mountain Tract and affirmed the judgment confirming Taylor's title thereto. *Id.* at 738-39.

II

On March 2, 1981, the petitioners filed this civil action in the Costilla County District Court to quiet title to the Mountain Tract and, alternatively, for damages.[10] Taylor and

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[9] The translation of the Beaubien document recognized by the Tenth Circuit Court of Appeals for purposes of its analysis contained the following language:

> It has been ordered (decreed) that the lands of the Rito Seco remain uncultivated for the benefit of the people of the town of San Luis, San Pablo and Los Ballejos and the other inhabitants of these towns, for the purpose of ingress and pasture, etc. and that the water of said creek shall be apportioned between the inhabitants of the said town of San Luis and those on the other side of the vega who have lands adjoining and close to the said vega, since said lands are not irrigated with the waters of the Culebra River . . . .
>
> All the inhabitants shall have the right, with convenient arrangement, to enjoy the benefits of the grazing lands, water, wood and timber, always being careful not to be prejudice [sic] with one another.

Sanchez, 377 F.2d at 735 n. 1.

[10] The complaint also requested an order declaring void a quiet title decree entered in a state court proceeding affecting title to another tract of land, the Salazar Tract, on grounds of constitutionally insufficient notice. As the petitioner acknowledged at oral argument, only issues relating to

over 240 other persons and entities are named as defendants. The complaint alleges that the petitioners, all but four of whom are residents of Costilla County, Colorado, "were and are heirs or successors in interest of the original settlers of the Sangre de Cristo Grant at or near the towns of San Luis, San Pablo, San Acacio, Chama, San Francisco, and La Valle, territory of New Mexico, Republic of Mexico, now within the County of Costilla, State of Colorado." The complaint also alleges that the case is "brought on behalf of the heirs and successors in interest to the original settlers of the Sangre de Cristo Grant";[11] that the Mountain Tract has been "historically subject to the community rights and uses of the [petitioners] for grazing, lumber, fire, wood, water, pasturing, hunting and recreational uses"; and that the decree issued in the 1960 Torrens action is void because it was obtained in violation of the petitioners' constitutional rights to due process of law.

The complaint contains three claims for relief. The first claim alleges that the Mountain Tract is a "community land grant under the laws of Mexico and Spain, the custom of the people of the area, by grant and dedication express and implied, and as guaranteed to the plaintiffs under the Treaty of Guadalupe Hidalgo in perpetuity." The second claim contains the following allegations:

> Use of [Taylor's] land for grazing, wood, [sic] gathering, timber, hunting, fishing, and recreational uses is guaranteed to the [petitioners] and their class by the law

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the Mountain Tract and the 1960 Torrens action are before this court. The record indicates that some of the petitioners were named defendants in the 1960 Torrens action, that some of those named defendants filed answers to Taylor's interrogatories, and that the others failed to answer the interrogatories and suffered default judgments.

[11] The trial court has not determined the petitioners' request to certify the case as a class action.

> of Mexico and Spain, customs of the people of the area, by grant and dedication express and implied, and as guaranteed to the [petitioners] under the Treaty of Guadalupe Hidalgo in perpetuity.

The third claim is based on sections 38-36-187 to -188 of the Torrens Act, which provisions authorize recovery of damages from an assurance fund by persons otherwise barred by the Torrens Act from seeking recovery of land or an interest therein. The complaint alleges, *inter alia,* that Taylor improperly failed to join necessary and ascertainable parties named as defendants.[12]

On April 1, 1985, Taylor filed a "MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT," which motion included a request for attorney fees. Taylor argued that the petitioners' claims were barred by the doctrines of res judicata, stare decisis and collateral estoppel. Taylor further argued that the claims were barred by the Torrens Act, by C.R.C.P. 105, by adverse possession, abandonment, several statutes of limitations [13] and by laches. Taylor also argues that the trial court lacked subject matter jurisdiction over the petitioners' claims.

The trial court granted Taylor's motion.[14] It held that the

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[12] Other improprieties alleged to have occurred during the course of the 1960 Torrens action include assertions that the qualifications and conduct of the Examiner of Titles were improper; that the entry of default judgments against defendants was improper because the trial court and Taylor's attorney knew or should have known that those defendants were not in fact represented by any attorneys; that attorneys Sam T. Taylor and Eliu E. Romero were incompetent; and that the trial court erred in failing to conduct a hearing to determine the adequacy of Taylor's proposed service by publication.

[13] *See* Note 3, *supra.*

[14] The trial court stated that it assumed all the facts alleged by the petitioners to be true for purposes of its ruling. However, the trial court also stated that no significant factual disputes existed.

claims asserted by the defendants in the 1960 Torrens action were "the same as the claims asserted by [petitioners] in this case"; that "[t]he usage in the federal case was the same as the usage here asserted"; and that the petitioners' contentions concerning the status of their rights had been considered and rejected in the 1960 Torrens action. The trial court denied Taylor's request for attorney fees.

The petitioners appealed the trial court's judgment dismissing their claims to the court of appeals, and Taylor cross-appealed on the issue of attorney fees. The court of appeals affirmed.

With respect to the petitioners' appeal, the court of appeals affirmed the trial court's judgment on the single ground that the petitioners' claims were barred by the doctrine of res judicata. *Rael v. Taylor,* 832 P.2d 1011, 1014 (Colo.App. 1991). Citing *Newby v. Bock,* 120 Colo. 454, 210 P. 985 (1949), the court observed that the doctrine is applicable when the prior action "involved an identity of the subject matter; identity of cause of action; identity of parties to the action; and identity of capacity in the parties for whom or against whom the claim is made." *Rael,* 832 P.2d at 1013. The court concluded that the subject matter and cause of action components of the *Newby* standard were satisfied and that the capacity of the parties was not at issue. With respect to the requirement of identity of parties, the court described the petitioners' position as follows:

> [Petitioners] argue that they were not named, served, or in privity with the parties to the previous actions, and therefore, they are not barred from litigating the present claim.

Rael, 832 P.2d at 1014. Relying on *Pomeroy v. Waitkus,* 183 Colo. 344, 517 P.2d 396 (1973); *Green v. Chaffee Ditch Co.,* 150 Colo. 91, 371 P.2d 775 (1962); and *Brian v. Valley View Cattle Ranch, Inc.,* 35 Colo.App. 428, 535 P.2d 237 (1975), the court of appeals held that the petitioners' claims are based

on their status as successors in interest to the defendants in the 1960 Torrens action and that, therefore, the decree entered in that action is binding on the petitioners as parties in privity with those defendants. *Rael,* 832 P.2d at 1014.

Because it deemed its resolution of the res judicata issue dispositive, the court of appeals did not address any of the other issues raised by the petitioners in their appeal. The court of appeals also affirmed the trial court's judgment denying Taylor's request for attorney fees.

We granted petitioners' application for certiorari on the following two issues: whether adequate notice was provided in the 1960 Torrens action and whether the court of appeals erred by determining the question of res judicata without first addressing the question of adequate notice. We also granted Taylor's cross-petition for certiorari review of the trial court's denial of Taylor's request for attorney fees.

III

Our initial inquiry focuses on the propriety of the court of appeals' determination of the applicability of the doctrine of res judicata to the circumstances of this case without first considering the petitioners' due process challenge to the adequacy of notice in the 1960 Torrens action. The petitioners in essence argue that if, as they contend, notice publication in the 1960 Torrens action was constitutionally defective, the decree entered therein is void as to them and the doctrine of res judicata is inapplicable to them. Although Taylor's brief filed before this court does not address this issue, amicus Land Title Association of Colorado argues that the court of appeals did address the question of notice.

As we previously noted, in its opinion, the court of appeals does describe the petitioners' contention that the 1960 Torrens action decree is void because the publication notice procedures adopted by Taylor violated due process standards.

The court also notes that this argument is germane to one prong of the res judicata test: the question of the identity of parties or their privies. However, the court then concludes that because the petitioners' claims were based on their status as successors in interest to the Torrens action defendants, the requirement of identity of parties was satisfied.

This analysis does not directly address the petitioners' argument that publication notice was constitutionally inadequate and the 1960 Torrens action decree is therefore void as to their predecessors in interest and as to them. If the petitioners prevail on this issue, the doctrine of res judicata cannot bar their claims because neither they nor their predecessors in interest can be deemed parties to the 1960 Torrens action. Thus determination of the applicability of the doctrine of res judicata in this case depends on a determination of the due process challenge to the sufficiency of the publication notice in the 1960 Torrens action. Assuming, *arguendo,* that the court of appeals did determine, *sub silentio,* that the publication notice adopted in the 1960 Torrens action did not violate due process requirements, we conclude that the record is inadequate to permit such determination in view of the standards applicable thereto.

IV

While the parties and the amici have advanced vigorous arguments respecting the authenticity and scope of the usufructuary rights claimed by the petitioners, those issues are not before us. Taylor asserts that any such rights were extinguished by the decree issued in the 1960 Torrens action and that the petitioners' claims are barred by the doctrine of res judicata. The petitioners argue that the decree issued in the 1960 Torrens action is void and therefore not dispositive of their claims because the notice publication procedure adopted by Taylor in that action deprived them of due process

of law.[15] The validity of that decree is thus central to the parties' arguments here.

A

The Torrens Act, originally enacted in 1903,[16] is similar to statutes incorporating systems of title registration adopted during the late nineteenth and early twentieth centuries in various other states.[17] These statutes were modeled after a South Australian title registration system devised in 1858 by Sir Robert Torrens to simplify the process of conveyancing of land titles to patented land. *See* Richard W. Laugesen, *The Torrens Title System in Colorado,* 39 *Dicta* 40 (1962). Similar land registration systems were developed and implemented in Europe and the British Isles during the nineteenth century. *See* Theodore Sheldon, *Land Registration in Illinois,* 112-14 (1901). All of these acts seek to enhance certainty of titles by establishing mechanisms to resolve all adverse claims to real property in one proceeding. *See, e.g., Sterling National Bank v. Fischer,* 75 Colo. 371, 373, 226 P. 146, 147 (1924) (purpose of Act was to "escape from the old rules governing the transfer of real estate"); *Reed*

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[15] The petitioners' arguments at times appear self-contradictory. All of the petitioners assert rights traceable to the original beneficiaries of the Beaubien Grant. However, the relationship of the petitioners to various categories of persons whose property rights were affected by the 1960 Torrens action is uncertain. The petitioners at one point indicate that some of them or their predecessors in interest were named defendants in the 1960 Torrens action, although the trial court found to the contrary. However, the petitioners also suggest that they or their predecessors in interest were improperly deemed unknown parties in that action.

[16] Land Titles Registration, ch. 139, §§ 1-99, 1903 Colo.Sess.Laws 311-52.

[17] William F. Beers, Jr., Preface to *The Torrens System of Realty Titles* (1907). According to this author, California, Illinois, Massachusetts, Minnesota, Oregon, and the Territory of Hawaii adopted such legislation during this period. *Id.* at iii-iv.

v. Carlson, 95 N.W. 303, 303-304 (Minn.1903) (the "Legislature sought to attain in the transfer of lands a more reliable certainty and confidence than had previously been known, so that a purchaser of real estate could be assured by the last registered transfer that the title was in the apparent record owner."). *See also* Herbert T. Tiffany, *The Law of Real Property*, § 1314 at 109-110 (3d ed. 1939 & 1994 Supp.); Introduction to William F. Beers, Jr., *The Torrens System of Realty Titles* (1907). In contrast to other recording systems, the Torrens system is based on the principle that once title to land is registered pursuant to the statutory procedures and a certificate is issued by the court, subsequent good faith purchasers for value may ascertain all matters relating to the validity of the title from the certificate alone. Richard R. Powell & Patrick J. Rohan, *The Law of Real Property, Vol.* 7, ¶ 908[2], 83-4-5 (1993 & 1994 Supp.). This system is intended to eliminate the need to search records in a recorder's office to determine the status of a title, as required under traditional recording systems. *Id.* In addition, Torrens system legislation typically contains some form of indemnification provision under which registrants pay a fee into a fund from which persons whose interests are wrongfully affected by the registration of the land may seek compensation. *Id.* at ¶ 909[10] 83-36.

The Torrens Act reflects this pattern. An applicant seeking to register title to patented property under the Torrens Act must file an application for such registration together with an abstract of title with the district court of the county in which the land is located. §§ 38-36-108, 116, 16A C.R.S. (1982).[18] The content of the application is prescribed in pertinent part as follows:

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[18] The applicant must also file a certified copy of the application with the county clerk and recorder of the county in which the land or a major portion thereof is located. § 38-36-117, 16A C.R.S. (1982).

The application shall be in writing and shall be signed and verified by the oath of the applicant or the person acting in his behalf. It shall set forth substantially:

. . . .

(e) The names of all persons or parties who appear of record to have any title, claim, estate, lien, or interest in the lands described in the application for registration;

(f) Whether the land is occupied or unoccupied, and if occupied by any other person than the applicant, the name and post-office address of each occupant and what estate or interest he has or claims in the land;

(g) Whether the land is subject to any lien or encumbrance, and, if any, the nature and amount of the same, and if recorded, the book and page of record, and the name and post-office address of each holder thereof;

(h) Whether any other person has any estate or claims any interest in the land, in law or equity, in possession, remainder, reversion, or expectancy, and, if any, the name and post-office address of every such person and the nature of his estate or claim;

(i) In case it is desired to settle or establish boundary lines, the names and post-office addresses of all the owners of the adjoining lands that may be affected thereby, so far as the applicant is able upon diligent inquiry to ascertain the same;

. . . .

(k) When the place of residence of any person whose residence is required to be given is unknown, it may be so stated if the applicant also states that upon diligent inquiry he has been unable to ascertain the same.

§ 38-36-104, 16A C.R.S. (1982).

Immediately after the filing of the abstract of title, the court is required to appoint an examiner of titles, whose duties are described as follows:

> [The examiner] shall proceed to examine into the title and into the truth of the matters set forth in the application, and particularly whether the land is occupied, the nature of the occupation if occupied, and by what right, and, also as to all judgments against the applicant or those through whom he claims title, which may be a lien upon the lands described in the application. He shall search the records and investigate all the facts brought to his notice, and file in the case a report thereon, including a certificate of his opinion upon the title.

§ 38-36-118, 16A C.R.S. (1982). If the examiner's report is favorable to the applicant's claim of title, the clerk of the court, upon the filing of the report, must issue a summons. § 38-36-119, 16A C.R.S. (1982). Section 38-36-120 defines the parties to be included in the summons as follows:

> *Parties plaintiff and defendant—unknown claimants.* The applicant shall be known in the summons as the plaintiff. All persons named in the application or found by the report of the examiner as being in possession of the premises or as having of record any lien, encumbrance, right, title, or interest in the land, and all other persons designated as follows: "All other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein", shall be defendants.

§ 38-36-120, 16A C.R.S. (1982). Section 38-36-121 describes the content and manner of service of the summons as follows:

> The summons shall be directed to the defendants and require them to appear and answer the application within twenty days after the service of the summons, exclusive of the day of service. *The summons shall be served as is*

> *provided for the service of summons in civil actions in the district court in this state, except as otherwise provided in this article.* The summons shall be served upon nonresident defendants and upon "all such unknown persons or parties", defendant, by publishing said summons in a newspaper of general circulation printed and published in the county where the application is filed, once in each week for three consecutive weeks, and such service by publication shall be deemed complete at the end of the twenty-first day from and including the first publication. If any named defendant assents in writing to the registration as prayed for, which assent shall be endorsed upon the application or filed therewith and be duly witnessed and acknowledged, then in all such cases no service of summons upon said defendant shall be necessary.

§ 38-36-121, 16A C.R.S. (1982) (emphasis added).

Section 38-36-122 of the Torrens Act provides that the clerk of the court shall mail copies of the published notice to defendants who are non-residents of Colorado whose addresses are known or stated in the application and who have not entered appearances and are not personally served with summons. The Torrens Act also provides for additional service, as follows:

> Other or further notice of the application for registration may be given in such manner and to such persons as the court or any judge thereof may direct. The summons shall be served at the expense of the applicant, and proof of the service thereof shall be made as proof of service is now made in other civil actions.

§ 38-36-122,16A C.R.S. (1982).

Any person claiming an interest, whether named in the summons or not, may appear and file an answer within

specified time periods. § 38-36-125, 16A C.R.S. (1982).[19] If no answer is filed, the court may issue a decree confirming the applicant's title and ordering registration thereof, the effect of which decree is described as follows:

> By the description in the summons, "all other persons unknown, claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein", all the world are made parties defendant and shall be concluded by the default, order, and decree.

§ 38-36-126, 16A C.R.S. (1982).

If an answer is filed, the court must conduct a hearing. § 38-36-127, 16A C.R.S. (1982 & 1993 Supp.). However, in such circumstances the court shall first enter a default and order against all persons who did not file an answer. *Id.* Upon the conclusion of the hearing, the court shall enter a decree of confirmation of title and registration if it determines the applicant has title proper for registration. § 38-36-130, 16A C.R.S. (1982). The effect of such a decree is established by section 38-36-130 as follows:

> Every decree of registration shall bind the land and quiet the title thereto, except as otherwise provided in this article, and shall be forever binding and conclusive upon on all persons, whether mentioned by name in the application or included in "all other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein", and such decree shall not be opened by reason of the absence, infancy, or other disability of any person

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[19] The Act also provides for the protection of the interests of minor children and those not yet born, through the appointment of a guardian ad litem "for minors and other persons under disability and for all other persons not in being who appear to have an interest in the land." § 38-36-124, 16A C.R.S. (1982). *See Gerbig v. Spelts*, 89 Colo. 201, 205, 300 P. 606, 608 (1931).

> affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees, except as especially provided in section 38-36-131. An appeal may be taken as provided by law and the Colorado appellate rules within the same time and upon like notice, terms, and conditions as are provided for the taking of appeals from the district court to the appellate court in civil actions.

§ 38-36-130, 16A C.R.S. (1982). Section 38-36-131(1) of the Torrens Act provides that any person having an interest in the land who was not actually served with process or notified of the application may file an answer to the application within ninety days after the entry of such decree, and not afterwards. Section 38-36-131(2) authorizes persons aggrieved by a decree to file a tort action and to file an action for indemnity pursuant to section 38-36-187. Section 38-36-186 establishes an assurance fund in the event of indemnity claims. Section 38-36-132 limits collateral attacks on decrees as follows:

> No person shall commence any proceeding for the recovery of lands or any interest, right, lien, or demand therein or upon the same adverse to the title or interest as found or decreed in the decree of registration unless within ninety days after the entry of the order or decree. This section shall be construed as giving such right of action to such person only as shall not, because of some irregularity, insufficiency, or for some other cause, be bound and concluded by such order or decree.

§ 38-36-132, 16A C.R.S (1982). Claims against the assurance fund must in general be made within six years of the time the right to bring such action first accrues. § 38-36190, 16A C.R.S. (1982).

The foregoing synopsis demonstrates the significance of the notice requirements of the Torrens Act. A basic distinction is drawn between known and unknown persons asserting interests in the affected real property. The former class must be named as defendants and served personally pursuant to

applicable rules of civil procedure. The latter class may be served by publication. The United States Supreme Court and this court have recognized that the constitutional guarantees of due process of law provide minimum standards for determining whether in particular in rem proceedings publication notice is sufficient to deprive a person of an alleged property right. The initial question posed by the petitioners in this case is whether Taylor satisfied those constitutional standards in the 1960 Torrens action.

V

The petitioners argue that Taylor's failure to comply with the then applicable provisions of Rule 4(h), C.R.S.1953,[20] renders the decree entered in the 1960 Torrens action void.[21] They also argue that their names or the names of their predecessor in interest were or should have been known to Taylor at the time he filed his application. We reject the

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[20] Our references to Rules 1, 4, and 81 in the opinion are references to the Rules of Civil Procedure as they were formulated in 1960, when Taylor filed his 1960 Torrens action. The relevant provisions of those earlier rules are substantially similar to their counterparts in our current Colorado Rules of Civil Procedure.

The parties do not suggest that the question of the adequacy of the notice publication in the 1960 Torrens action should be answered by reference to Rule 4 of the Federal Rules of Civil Procedure. *Compare Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1945), and *Hanna v. Plummer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), *with Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949); *and Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980).

[21] It is not clear whether some of the named petitioners premise their claims on asserted direct personal interests in Mountain Tract land or whether all of the named petitioners premise their claims on interests owned by their predecessors in interest.

former argument. With respect to the latter argument, we conclude that disputes of material fact remain for resolution at the trial level before the issue can be resolved.

A

The Colorado Rules of Civil Procedure apply to all civil actions in law or equity filed in district court "except as stated in Rule 81." C.R.C.P. 1(a) Rule 81 provides that the rules of civil procedure do not apply to special statutory proceedings "insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute." C.R.C.P. 81. Rule 4(h) establishes the procedure for service by publication on unknown persons, as follows:

> (h) *Publication.* The party desiring service of process by publication shall file a motion verified by the oath of such party or of some one in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that his address and last known address are unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state or that efforts to obtain the same would have been to no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within 15 days after the order the clerk shall mail a copy of the process to each person whose address or last known address has been stated in the motion. Service shall be complete on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county.

A party in a civil action filed in a Colorado district court who wishes to serve unknown persons by publication must file a verified motion with the court alleging sufficient facts

to establish that the party used "due diligence" to obtain personal service in Colorado or that efforts to obtain such service "would have been to no avail." *Id.* Publication notice is available only upon a court order, subsequent to judicial examination of the motion. In the absence of a verified motion and court review thereof, service by publication on unnamed parties is not possible under C.R.C.P. 4(h).

An applicant in a Torrens Act proceeding must submit a verified application containing specific information, including names and addresses of various categories of potential defendants. § 38-36-104, 16A C.R.S. (1982). A court-appointed examiner of titles must assess the truth of the averments contained in the application, determine whether the land is occupied, search the records, investigate facts brought to the examiner's attention, and file with the clerk of the court a report that includes a certificate of opinion upon the title to the land. § 38-36-118, 16A C.R.S. (1982). Ultimately, summons is issued by the clerk of the court, by order of the court. § 38-36-119, 16A C.R.S. (1982). The Torrens Act provides that service on non-residents and unknown defendants shall be accomplished through publication of the summons for three weeks. § 38-36-121, 16A C.R.S. (1982).

It is readily apparent that the Torrens Act scheme for identifying persons to be served by publication notice differs from the comparable requirements of C.R.C.P. 4(h). The Torrens Act does not require the filing of a motion specifying what steps the applicant took to identify persons with interests in the subject property. Rule 4(h) requires the filing of such motion. In the Torrens Act proceeding an examiner reviews the application to determine the truth of the information provided by the applicant. Rule 4(h) requires the court to review a party's motion for publication notice on the basis of a due diligence standard. The Torrens Act requires personal service only for those persons named in the application and other persons named by the examiner.

Publication notice pursuant to Rule 4(h) must continue for four consecutive weeks; the comparable Torrens Act provision specifies a period of only three consecutive weeks.[22] In view of these differences, we conclude that, pursuant to C.R.C.P. 81, the provisions of the Torrens Act govern service of process in this case. *See Petition of Brainerd Nat'l Bank,* 383 N.W.2d 284, 286 (Minn.1986) (rules of civil procedure do not apply to Torrens proceedings if the rules are inconsistent or in conflict with the Act's provisions); *Dewey v. Kimball, et al. Same v. National Bond & Surety,* 96 N.W. 704, 705 (Minn.1903) (provisions of Torrens Act are exclusive and provide the mode and manner of service upon non-residents and unknown defendants).

B

The petitioners also assert that service by publication rather than by personal service on them or their predecessors in interest in the 1960 Torrens action was constitutionally deficient and renders the decree void. While the Torrens Act is designed to eliminate attacks on decrees of confirmation, challenges to the efficacy of such decrees based on alleged constitutional deficiencies of notice are not foreclosed. *See Petition of Brainerd Nat'l Bank,* 383 N.W.2d 284, 287 n. 2 (Minn.1986) (citing previous cases where Torrens decrees were set aside for constitutional defects); *Riley v. Pearson,* 139 N.W. 361, 366 (Minn.1913) (if claimants known to applicant or named by examiner are not named as parties, the decree is not binding on such claimants and may be attacked collaterally; a contrary conclusion would raise constitutional concerns). *See generally* Richard R. Powell & Patrick J. Rohan, *The Law of Real Property* Vol. 7, ¶ 909[4], 83-24 (1993 & 1994 Supp.).

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[22] The trial court in the 1960 Torrens action ordered publication for six consecutive weeks.

Such a challenge, if successful, does not render the confirmation decree void for all purposes, contrary to the petitioners' suggestion. Only a person denied adequate notice may attempt to establish that person's interest in the subject property. *Riley,* 139 N.W. at 366. *See Gerbig v. Spelts,* 89 Colo. 201, 206, 300 P. 606, 608 (1931).

The contours of any inquiry into the constitutional sufficiency of service by publication in civil actions affecting property rights are shaped by the decision of the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust* Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).[23] In *Mullane,* the Court addressed the question of whether the beneficiaries of certain constituent entities comprising a common trust fund were entitled to individual notice of periodic accounting which, if not challenged, became binding

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[23] Although *Mullane* and its progeny are generally recognized as articulating the current due process standards for determining the efficacy of publication notice in civil actions involving property interests, the Court had previously recognized that due process principles require plaintiffs in quiet title actions to make diligent efforts to ensure adequate notice to all potential defendants. In *American Land Co. v. Zeiss*, 219 U.S. 47, 66, 31 S.Ct. 200, 206-07, 55 L.Ed. 82 (1911) the Court reviewed the constitutionality of a 1906 California statute enacted in response to the "conditions caused in San Francisco by the great calamity of earthquake and fire" to "provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." *Id.* at 48-49, 31 S.Ct. at 200-01. The statute, which incorporated features of the Torrens registration system, had previously been held constitutional by the California Supreme Court in *Title Document Restoration Co. v. Kerrigan,* 150 Cal. 289, 88 P. 356 (1906). The Supreme Court held that the statute satisfied due process criteria for notice because it imposed a "duty [on the person seeking to quiet title] to make diligent inquiry to ascertain the names of all claimants," which provision demonstrated "the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of the unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested." *American Land Co.*, 219 U.S. at 66, 31 S.Ct. at 207.

and conclusive on all persons or entities having an interest in the common fund. With regard to this question, the Court stated as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . "The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." *American Land Co. v. Zeiss,* 219 U.S. 47, 67 [31 S.Ct. 200, 207, 55 L.Ed. 82] [1911] . . . .
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.
>
> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Mullane, 339 U.S. at 314-15, 70 S.Ct. at 658 (citations omitted). Applying this broad standard to the circumstances before it, the Supreme Court concluded that service by publication was sufficient notice to persons "missing or unknown . . . . whose interests or whereabouts could not with due diligence be ascertained." *Id.* at 317, 70 S.Ct. at 659. However, with respect to "known present beneficiaries of known place of residence," the court concluded as follows:

> Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less than likely than the mails to apprise them of its pendency.

Id. at 318, 70 S.Ct. at 659.

Mullane thus established a dual standard for evaluating the adequacy of publication notice: whether under all the circumstances the means selected was reasonably calculated to reach interested parties and whether the party giving notice had exercised due diligence to ascertain the identities of interested parties.

In *Walker v. Hutchinson,* 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), the Court applied the *Mullane* criteria to require personal notice to property owners affected by a city's widening of a street whose names and addresses were contained in city records. In *Schroeder v. City of New York,* 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), the Court held that notice by publication and by posting on trees in the general vicinity of property owned by a landowner who claimed usufructuary rights in a stream and who resided twenty-five miles upstream from a new municipal diversion project was inadequate for due process purposes with respect to that landowner. In *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), the

Court held that mortgagees of property sold at a tax sale without their knowledge were entitled to personal notice.

Most recently, in *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), the Court considered the constitutional sufficiency of a notice publication provision of an Oklahoma nonclaim statute. Citing extensively to *Mullane,* the Court held that publication notice to reasonably ascertainable creditors who might be unaware of a debtor's death violated due process standards. While acknowledging the state's interest in quickly terminating probate proceedings, the Court concluded that requiring notice by mail to all known or reasonably ascertainable creditors of the decedent did not conflict with this purpose. *Tulsa,* 485 U.S. at 489-90, 108 S.Ct. at 1347-48. The Court remanded the case for a determination of whether the plaintiff's identity as a creditor was reasonably ascertainable. *Id.* at 491, 108 S.Ct. at 1348.

This court has recognized that in quiet title actions diligent inquiry and notice reasonably calculated to apprise interested parties of a pending proceeding affecting such interests are required.[24] *Weber v. Williams,* 137 Colo. 269, 275-76, 324 P.2d 365, 368 (1958) (quoting *Coppinger v. Coppinger,* 130 Colo. 175, 274 P.2d 328 (1954)); *Bray v. Germain Investment Company,* 105 Colo. 403, 407, 98 P.2d 993, 995 (1940). *See also Federal Farm Mortgage Corp. v. Schmidt,* 109 Colo. 467, 470-71, 126 P.2d 1036, 1038 (1942) (mortgagee's failure to state in affidavit for publication notice filed in foreclosure action the addresses of mortgagors sought to be served or state that such information was unknown to the affiant rendered decree invalid). While these cases required application of the due diligence standard of C.R.C.P. 4(h) in various contexts, they recognize the importance of supplying

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[24] The rules of civil procedure, including the notice publication provisions of C.R.C.P. 4(h), are applicable in quiet title proceedings.

official notice of pending in rem litigation to persons whose interest in the res will be affected by those proceedings. In *White v. Ainsworth*, 62 Colo. 513, 163 P. 959 (1917), this court upheld the constitutionality of the publication notice provisions of the Torrens Act as applicable to out-of-state residents. In rejecting arguments that such provisions violated the due process rights of such non-Colorado residents and that the confirmation decree was obtained by fraud, we declined to address an argument to the effect that the decree was invalid as to such persons because the applicant's failure to include them as named defendants in the Torrens action constituted actual or constructive fraud. *Id.*, at 520-24, 163 P. at 962-63. In *Mills v. Denver & R.G.R. Co.*, 198 F. 137 (D.Colo.1912) (injunction suspended and case remanded), 199 F. 988 (8th Cir.1912), *but reaff'd*, 222 F. 481 (8th Cir. 1915), the court held that service by publication in a Torrens Act proceeding satisfied due process standards of notice with respect to a railroad company's claim of a right of way over the property. The court noted that at the time the Torrens Act proceedings were commenced "there was nothing of record, or upon the ground, to advise the [applicant] or examiner of titles . . . that the [railroad company] claimed any interest therein." 198 F. 137 at 14142. These cases recognize the general rule that Torrens Act applicants have a duty to exercise reasonable diligence in identifying all reasonably ascertainable persons who claim interests in the property and are thus entitled to personal service.

Other courts upholding the constitutionality of publication notice provisions of Torrens system statutes have acknowledged that applicants must use due diligence to ascertain the identities of interested persons to be served personally in proceedings to register title to property. *See, e.g., Follette v. Pacific Light & Power Corp.*, 189 Cal. 193, 208 P. 295, 298-99 (1927) (statutory provision which imposes on applicants a duty of inquiry as to the names and residences

of all persons who may claim an adverse interest and which does not permit applicants to willfully or negligently close their eyes "'to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity [they] might have learned by the use of due effort,'" satisfies due process); *Robinson v. Kerrigan,* 151 Cal. 40, 90 P. 129, 131 (1907) (statutory provision allowing publication notice to "unknown" persons held constitutional because it requires personal service to all reasonably ascertainable claimants). *See also State v. Guilbert,* 56 Ohio St. 575, 47 N.E. 551 (1897) (Torrens statute that did not require applicant to personally serve all reasonably ascertainable claimants held unconstitutional for lack of due process).

These cases suggest the standard by which to measure the petitioners' due process claims in this case. In Torrens Act proceedings, as in other in rem actions, notice must be reasonably calculated under all relevant circumstances to ensure that interested parties are made aware of the proceedings. In view of the sharp distinction drawn by the Torrens Act with respect to named defendants who must be served personally and unknown persons who may be served by publication, applicants must act with reasonable diligence to ascertain the names of persons who claim an interest in the property subject to the proceedings. The test of reasonable diligence, as established by *Mullane* and its progeny, is an objective test: the conduct a reasonably prudent applicant would undertake under all circumstances known or reasonably discoverable by the applicant at the time the application is filed to ensure that interested parties will be identified and served as named defendants.

The structure and language of the Torrens Act supports this conclusion. As previously noted, section 38-36-104 of the Torrens Act prescribes the contents of the verified application. Section 38-36-104(1)(g) requires an applicant to

list the names and addresses of all persons who appear of record to have an interest in the subject property. Section 38-36-104(1)(h) requires an applicant to list the names and addresses of any person who claims "any interest in the land, in law or equity, in possession, remainder, reversion, or expectancy." These sections are silent with respect to what efforts an applicant must make to obtain the required information. However, section 38-36-104(1)(i) expressly requires an applicant to make "diligent inquiry" to ascertain the names and addresses of owners of adjoining land if the proceedings include issues relating to the settlement or establishment of property lines. Furthermore, section 38-36-104(1)(k) requires an averment that the applicant has made "diligent inquiry" to ascertain the place of residence of any person whose residence is by the terms of the Torrens Act required to be listed. When construed together, these sections disclose the General Assembly's intent to require applicants to exercise reasonable diligence in ascertaining the names and addresses of persons having any interest in the subject property and therefore required to be listed in the application and personally served. A contrary construction of these statutory provisions would render the Torrens Act constitutionally suspect.[25]

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[25] Other courts have recognized a requirement of diligent inquiry into the identity of all reasonably ascertainable claimants under their states' Torrens statutes. *See, e.g., Moakley v. Los Angeles Pac. Ry. Co.*, 99 Cal.App. 74, 277 P. 883, 884-85 (1929) (failure to name person in petition whose interest was easily ascertainable from abstract violated statutory notice requirements); *Couey v. Talalah Estates Corp.*, 183 Ga. 442, 188 S.E. 822, 826-28 (1936) (due process required personal service to reasonably ascertainable claimant); *Chicago Title & Trust Co. v. Darley*, 363 Ill. 197, 1 N.E.2d 846, 849 (1936) (under Torrens statute, "a person having or claiming any interest in the land, whose name and address is known or can be ascertained upon diligent inquiry, cannot be made a party as 'all whom it may concern.'"); *Sheaff v. Spindler*, 339 Ill. 540,171 N.E. 632, 638-39 (1936) (Torrens statute requires individual notice to all claimants whose names can be ascertained through diligent inquiry);

In sum, an applicant for a decree to confirm and register title to property pursuant to the Torrens Act must exercise reasonable diligence under all the circumstances to ascertain the names of persons who claim interests in the property subject to the proceeding. The test for determining reasonable diligence is an objective test: that conduct a reasonably prudent applicant would undertake under all circumstances known or reasonably discoverable by the applicant at the time the application is filed to ensure that all interested parties are identified and served as named defendants.[26] The Due Process Clause of the United States Constitution and the Torrens Act as adopted by the General Assembly require no less.[27]

Dewey v. Kimball, 89 Minn. 454, 95 N.W. 317, 319-20 (1903) (Torrens applicant's disregard of information in title examiner's report constitutes a lack of due diligence and renders decree void as to person named by examiner). *See also Baart v. Martin,* 99 Minn. 197, 108 N.W. 945, 947 (1906) (intentional fraud in failing to name known interested person as defendant renders decree invalid).

[26] We recognize that applicants in Torrens proceedings generally need not extend their search for information pertaining to reasonably ascertainable interested parties beyond information discoverable by diligent inquiry into relevant public records. In this case, the petitioners' asserted interests were arguably recorded in the Costilla County records, referred to in Taylor's deed and the Gilpin agreement, referenced in the title examiner's report, and noted in Taylor's own application.

[27] Our decision in this case is limited to consideration of whether the notice provided in the 1960 Torrens action was constitutionally sufficient. As we have explained, the provisions authorizing publication notice to "unknown" parties contained in C.R.C.P. 4(h), which provisions require a petitioner in a quiet title proceeding to submit a verified motion stating what efforts have been made to identify all reasonably ascertainable interested persons, were not applicable to the 1960 Torrens action. A petitioner in a quiet title proceeding who complies with the requirement of Rule 4(h) in effect provides the trial court with evidence presumptively establishing that the due diligence standard of notice has been satisfied. Taylor's suggestion that acceptance of the petitioners' contention that they are entitled to an appropriate adjudication of their constitutionally based

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In this case, the petitioners' complaint initially made claims of denial of due process. Taylor's motion for judgment on the pleadings or for summary judgment asserted that the petitioners' claims against him were barred by the doctrine of res judicata. The petitioners again asserted their due process claims in their response to Taylor's motion. In granting the motion, the trial court did not apply the test enunciated above to determine whether the confirmation decree must' be deemed invalid as to some or all of the petitioners because the publication notice was constitutionally ineffective with respect to them. In affirming the trial court's judgment, the court of appeals did not indicate the test it applied in rejecting those claims, assuming that such claims were considered by that court.

In some circumstances this court may apply the appropriate legal standard to the factual circumstances presented by the record and resolve questions of law not addressed or improperly resolved in earlier proceedings. However, the record in this case forecloses this avenue.

As the trial court observed, insofar as Taylor's motion can be deemed a motion for judgment on the pleadings, all allegations of the complaint must be considered true. *See Trinity Broadcasting v. Westminster,* 848 P.2d 916, 925 (Colo.1993). The complaint contains allegations of Taylor's lack of reasonable diligence that are sufficient to overcome

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claim of lack of adequate notice of the 1960 Torrens action will affect the certainty of quiet title decrees entered in state court quiet title actions is thus without foundation. In addition, the burden of proving lack of adequate notice in any challenge to a Torrens decree rests on those persons challenging such notice. Had Taylor certified in the 1960 Torrens action his efforts to identify all reasonably ascertainable persons with identifiable interests in the Mountain Tract, as he would have been required by Rule 4(h) to do in a quiet title proceeding, this litigation might have been foreclosed by direct application of the doctrine of res judicata.

any motion for judgment on the pleadings with respect to the constitutional adequacy of the publication notice in the 1960 Torrens action.

To the extent Taylor's motion is deemed a motion for summary judgment, the petitioners' response thereto raised the question of the constitutional adequacy of the publication notice in the 1960 Torrens action. Summary judgment is a drastic remedy and may not be granted if genuine issues of material fact remain for resolution. *Cung La v. State Farm Auto. Ins. Co.,* 830 P.2d 1007, 1009 (Colo.1992); *Civil Service Comm 'n v. Pinder,* 812 P.2d 645, 649 (Colo.1991); C.R.C.P. 56(c). The limited record before us discloses numerous issues of disputed fact material to the resolution of the petitioners' due process claim. Whether Taylor's conduct in ascertaining named defendants who were entitled to personal service in the 1960 Torrens action satisfied the requisite standard cannot be determined in the absence of a resolution of such disputed facts. The necessary factual determinations and the application of the appropriate legal principles to those determinations must be made and performed by the trial court.

VI

Taylor has cross-appealed the denial by the trial court and the court of appeals of his request for attorney fees. Section 13-17-101, 6 C.R.S.1973 (1978 Supp.), authorizes trial courts to award attorney fees against parties who bring or maintain "frivolous or groundless" actions.[28] In *Western United Realty, Inc. v. Isaacs,* 679 P.2d 1063 (Colo.1984), we held that a claim is "frivolous" for purposes of the statute "if the

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[28] As Taylor notes, § 13-17-101, 6 C.R.S.1973 (1978 Supp.), was repealed and reenacted as § 13-17-102, 6A C.R.S. (1987), during the pendency of the trial proceedings. Ch. 107, sec. 2, § 13-17-102, 1984 Colo.Sess.Laws 460. The provisions authorizing awards of attorney fees set forth in § 13-17-102, 6A C.R.S. (1987), are applicable to Taylor's claim for attorney fees on appeal.

proponent can present no rational argument based on the evidence or law in support of that claim . . . ." *Id.* at 1069. We also held that a claim is "groundless" for purposes of the statute "if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial." *Id.* In this case the trial court concluded that the action filed by the petitioners was neither groundless nor frivolous, observing that there is legal authority to support some of the issues asserted by the petitioners. The court of appeals affirmed the trial court's determination.

Taylor does not directly refer to the standards we articulated in *Isaacs*. He argues that the trial court and the court of appeals erred in failing to analyze certain issues allegedly unsupported by factual or legal authority; that the petitioners have provided no authority to deny Taylor's defenses based on various statutes of limitations; and that the petitioners have litigated time-barred judicially determined issues, which conduct should establish a presumption that the petitioners' claims are frivolous, groundless, and vexatious.

Taylor's arguments are not persuasive. The petitioners' fundamental claim-that the publication notice used in the 1960 Torrens action violated standards of due process of law, rendering the decree invalid as to some or all of their predecessors in interest—is a rational argument supported by authority. We have concluded that the record contains some credible evidence to support that claim, and the petitioners have cited relevant authority to support their arguments. We conclude that the trial court and the court of appeals did not err in holding that the petitioners' claims were neither frivolous nor groundless.

Section 13-17-101, 6A C.R.S. (1987), authorizes courts to award attorney fees when the "bringing . . . of an action, or part thereof . . . is determined to have been substantially frivolous, substantially groundless, or substantially vexa-

tious." We determined in *In re Application of Talco, Ltd.*, 769 P.2d 468, 476-77 (Colo.1989), that the standards of "substantially frivolous" and "substantially groundless" do not differ materially from their counterparts in section 13-17-101, 6 C.R.S.1973 (1978 Supp.). For the reasons supporting our conclusions that the petitioners' claims are neither frivolous nor groundless, we conclude that their decision to appeal the trial court's adverse judgment was neither substantially frivolous nor substantially groundless. Furthermore, the petitioners' due process challenge to the publication notice procedure utilized in the 1960 Torrens action has never been adjudicated. Given this these circumstances, the petitioners' appeal is not substantially vexatious. We conclude that the court of appeals did not err in affirming the trial court's denial of Taylor's request for attorney fees.

VII

For the foregoing reasons, the judgment of the court of appeals is affirmed insofar as it upheld the trial court's denial of Taylor's request for attorney fees and reversed insofar as it held the petitioners' claims barred by the doctrine of res judicata. Whether any of the plaintiffs ultimately meet their burden of establishing that the 1960 Torrens decree is not binding as to them can only be decided after a determination of the adequacy of the notice given all reasonably ascertainable persons with identifiable interests in the Mountain Tract property in the 1960 Torrens action. The case is remanded to the court of appeals with directions to conduct further proceedings herein in conformity with this opinion, including consideration of the petitioners' arguments that the trial court erred in concluding that their claims are barred by various statutes of limitations.[29]

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[29] Because it affirmed the res judicata prong of the trial court's summary judgment, the court of appeals did not address the petitioners' challenges to the statutes of limitations portions thereof.

Justice VOLLACK dissents, and Chief Justice ROVIRA and Justice ERICKSON join in the dissent.

Justice VOLLACK dissenting:

The majority reverses the summary judgment order and remands to the trial court the issue of whether Jack Taylor, the applicant in the 1960 Torrens action, exercised reasonable diligence to identify parties who should have been named personally and should have received direct notice of the suit through personal service. I disagree. The notice required by statute, found by the federal district court to have been "met and fulfilled," and affirmed by the Tenth Circuit, satisfied the requirements of due process. I believe that the plaintiffs are barred by res judicata from relitigating the issues of the 1960 case. In my opinion, reopening the question of rights in property determined over thirty years ago is counter to the public policy of this state because it creates uncertainty in the conclusiveness of quiet title decisions and fails to keep title secure and marketable. For these reasons, I dissent.

I.

I agree with the trial court and the court of appeals that the plaintiffs are barred by res judicata from bringing this suit. Res judicata bars relitigation of a prior action when the two suits share the same subject matter, the same cause of action, and the same parties.[1] *Newby v. Bock,* 120 Colo. 454, 210 P.2d 985 (1949). Because the plaintiffs and their predeces sors in interest received adequate notice of the 1960 action, they were parties to it. Their due process rights were not violated and they are now barred by res judicata from reliti-

[1] The "same parties" requirement is satisfied if the parties of the second suit are in privity with those of the first. Many of the plaintiffs in the current suit are heirs of the defendants from the 1960 suit. As successors in interest, they are in privity with the earlier parties. *Green v. Chaffee Ditch Co., 150 Colo.* 91, *371* P.2d *775* (1962).

gating the same issues that were decided in that case over thirty years ago.

The Torrens Act specifically provides for notice to known and unknown potential claimants. Section 38-36-121, 16A C.R.S. (1982), requires that known, resident defendants be personally served with a summons, but that non-resident defendants and "all such unknown persons or parties" be served only by publication. Under the Act, all potential claimants, known and unknown, are made parties to the action. § 38-36-126, 16A C.R.S. (1982).

In the 1960 action, Taylor complied with all of the notice requirements of the Torrens Act. As the majority notes on page 1214 of its opinion, Taylor's application listed 316 individuals as potential defendants, even though only forty-seven of those names appeared in the abstract of title. The remaining names on the list were those landowners in the county who might claim usufructuary rights to the pasture and timber. Attorneys for potential claimants added an additional 142 names to the list.

In accordance with the Torrens Act, the federal district court appointed a title examiner, who submitted a report to the court. According to his report, the examiner studied the abstract of title and personally investigated the occupancy of the Mountain Tract. He also made inquiry with the county treasurer, the county assessor, and other persons familiar with the land to identify potential defendants to the action. His report indicated that "various persons claim rights to take pasture and wood from The Mountain Tract and an unincorporated organization called the 'Association of Civic Rights[,]' whose members are named in the petition, assert such rights on behalf of themselves and other persons." The report stated that these rights were claimed under a grant made by Carlos Beaubien on May 11, 1863 (the Beaubien

grant), which was located in the county land records.[2] The title examiner sought to learn the identities of these "other persons." He contacted the attorney for several defendants in a similar, but unrelated, lawsuit. The attorney tried to obtain the names but was unsuccessful. He also talked with a representative of the Association of Civic Rights, who also could not provide any specific names.

In addition to the parties identified in the petition and by the title examiner, other possible claimants were designated as "persons or parties unknown." These "un known" defendants were served by publication of the summons for six weeks in a newspaper of general circulation in Costilla County.

The named defendants were represented by several attorneys. The court also appointed a guardian ad litem "to represent minors and other persons under disability and all other persons who may have an interest in this proceeding." On July 31, 1962, the federal district court entered default against 369 defendants for failure to answer interrogatories. The case proceeded against the 112 remaining defendants.

The defendants asserted communal rights to use the Mountain Tract for pasture land and to take wood. They based their claims on Spanish or Mexican law; as beneficiaries under the Sangre de Cristo grant, in which the government of Mexico granted land to Narcisco Beaubien; the Treaty of Guadalupe Hidalgo; and on the 1863 document signed by Carlos Beaubien specifically granting usufructuary rights. The federal district court concluded that, as a matter of federal law, the communal rights under the Sangre de Cristo grant and the Treaty of Guadalupe Hidalgo were extinguished when title to the land was confirmed in Beaubien by an act of Congress in 1860. The district court also found that the communal rights established under the

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[2] The Beaubien grant is set out in the majority opinion at page 1213.

Beaubien document applied to the "lands of the Rito Seco," which were not part of the Mountain Tract. Even if the grant of usufructuary rights under the Beaubien document remained valid, therefore, it did not apply to the Mountain Tract. A final decree was entered on October 8, 1965. The decree vested fee simple title to the Mountain Tract in Jack Taylor, free of any claims of all persons, known and unknown. The defendants then appealed the decision to the Tenth Circuit, which affirmed the district court on all issues.

I believe that the plaintiffs in the current action, or their predecessors in interest, received proper notice of the Torrens action and that their due process rights were not violated. They had not recorded any interest in the land and did not occupy it.[3] They were thus included among the group of "unknown" potential claimants and were properly served by publication according to section 38-36-121.

The federal district court, in its "Final Decree of Confirmation of Title and Registration" of 1965, also concluded that notice was properly given to the defendants in the earlier case. The court noted that it had jurisdiction of the parties and the subject matter, and that "the statutory requirements of service, publication and notice have been met and fulfilled." As against a collateral attack on a prior court's jurisdiction, "the judgment of a court of record is supported by the conclusive presumption that jurisdiction was obtained of the party against whom it was pronounced, unless the contrary affirmatively appears from the record." *Hughes v. Webster,* 52 Colo. 475, 122 P. 789 (1912). There is no

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[3] It may be argued that the Beaubien grant provides record notice of the plaintiffs' claim of usufructuary rights. However, as the federal district court and the Tenth Circuit found, the potential claimants could not rely on this grant because the rights under it were extinguished by the 1860 act of Congress. Furthermore, those courts also found that the rights given under the Beaubien grant pertained to another land parcel, not the Mountain Tract.

indication in the record of the 1960 case, insofar as it is before this court, that proper notice of the suit was at issue, nor that notice by publication was not sufficient. The plaintiffs may not relitigate the issue of whether notice was adequate.

II.

The majority holding requires a Torrens Act plaintiff to exercise "reasonable diligence" to ascertain the identities of otherwise "unknown" claimants, that is, claimants whose names or interests do not appear in the record chain of title and who are not in possession of the land. I do not believe that there is such a duty, nor that the jurisprudence of other states supports one.

The majority cites nine cases from other jurisdictions for the proposition that a Torrens plaintiff, such as Taylor in this case, must exercise reasonable diligence in locating "unknown" potential claimants in order to effect personal service. I disagree with the majority's interpretation of these cases. The cases cited in the majority opinion all involve potential claimants who were not notified, but who were known or should have been known to the plaintiff through the chain of title, through public records, or because they were in possession of the land. Those courts found that the plaintiff should have exercised diligence to find and notify those *known* potential claimants by searching the public records in which they were identified.

In the first case cited by the majority, *Follette v. Pacific Light & Power Corp.*, 189 Cal. 193, 208 P. 295 (1927), the Torrens Act plaintiff granted a right-of-way easement to Pacific Light & Power Corporation. The easement was recorded and the grantee took possession of that portion of the land. The grantor then filed a Torrens action, but did not notify the utility company other than by publication. Subsequent owners of the property relied on the certificate of

title issued in the Torrens action. When Follette, a subsequent owner of the property, learned of the easement and sought to eject the utility company, the court ruled that the certificate of title issued to the original grantor was void as against the utility company, because, as an occupant of the land in question, the utility company should have received personal service. The court contrasted the utility company with those who needed only to receive notice by publication: "The provisions of the act as to publication of notice can have application only to those who were not in the possession or occupancy of the premises." *Id.* 208 P. at 299.

The next case relied on by the majority, *Robinson v. Kerrigan,* 151 Cal. 40, 90 P. 129 (1907), involved a general constitutional challenge to California's Torrens Act. The court found constitutional the provisions of the act for personal notice to all the parties shown by the application or by the abstract of title to have an interest in the property, to the spouse of the petitioner, and to the owners of the adjoining land. The court also found that service on all other persons could be by publication. Contrary to the majority's assertion, there is no discussion of personal notice to "reasonably ascertainable" claimants, nor of any duty placed on the plaintiff to directly notify anyone but the specific parties noted above.

The majority next cites *State v. Guilbert,* 56 Ohio St. 575, 47 N.E. 551 (1897), which it claims held that a Torrens statute that did not require an applicant to personally serve all reasonably ascertainable claimants was unconstitutional for lack of due process. *Guilbert* is inapposite because it construed a version of the Torrens Act very different from the one in place in Colorado. Neither does the case impose a duty on the plaintiff to seek out "reasonably ascertainable" claimants. The Ohio statute at issue in that case provided for personal service only upon owners of adjacent land, upon the occupant of the land, and upon holders of easements and

inferior estates in the land. All others could be served by publication. The court held the statute unconstitutional because the plaintiff was not required to give personal notice to those whom he knew had adverse claims against the property, including one who held the title in fee simple absolute.[4] That court further buttressed its reasoning by declaring that Torrens actions were actually in personam actions, not in rem actions, and thus would require personal notice.[5]

The majority cites an additional six cases for the proposition that "[o]ther courts have recognized a requirement of diligent inquiry into the identity of all reasonably ascertainable claimants under their states' Torrens statutes." Maj. op. at 1227 n. 25. Each one of these cases, however, involved claimants whose interests appeared in county land records, were named in the examiner's abstract, were in possession, or of whose interests the applicant had actual knowledge. They do not support the majority's contention that a Torrens applicant has a duty to search for

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[4] The Ohio legislature later passed a revised version of the Torrens Act. It requires notice to any "person [who] to the knowledge or information of the applicant, or as shown by the records, has or claims any interest in the lands, buildings, or improvements." Ohio Rev.Code Ann. §§ 5309.09, -09, 5309.12 (Anderson 1989). Unlike Colorado's statute, the Ohio Torrens statute mentions the necessity of diligent inquiry to ascertain potential claimants: "When the names of any persons . . . necessary or proper to be made parties defendant to an application, are unknown to the applicant after diligent inquiry and research," those parties are to be named in the petition as "unknown" and notified by publication. Ohio Rev.Code Ann. § 5309.12 (Anderson 1989). Unlike the Ohio legislature, however, the Colorado legislature chose not to include such language in its Torrens statute.

[5] It is, of course, of no import today whether the action is in personam or in rem, after *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

potential claimants beyond those who have a record interest in the property or those whose interests are known or should be known because of their possession of the land.

In *Moakley v. Los Angeles Pacific Railway Co.,* 99 Cal.App. 74, 277 P. 883 (1929), the Torrens plaintiff did not name or notify a claimant whose easement was recorded and appeared in the abstract of title. The claimant in *Couey v. Talalah Estates Corp.,* 183 Ga. 442, 188 S.E. 822 (1936), was known to the Torrens plaintiff to have an interest in the property, was in possession of the land, and was also an adjoining landowner. The statute required notice based on any of these conditions, but none was given. In *Chicago Title & Trust Co. v. Darley,* 363 Ill. 197, 1 N.E.2d 846 (1936), the claimant was in possession of the land at the time the Torrens action was filed, used the land for farming, and maintained fences on the property, but still received no notice. In *Sheaff v. Spindler,* 339 Ill. 540, 171 N.E. 632 (1930), the Torrens applicant failed to name the fee simple owner of record and the tenant in possession of the property. He admitted that he knew of the ownership and possession when he filed the Torrens action. In contrast to the other cases cited by the majority, this one does mention the necessity of "diligent inquiry." By this phrase, however, the court imposed a duty of diligent inquiry to search the public records for recorded interests in the land. The Torrens plaintiff in *Dewey v. Kimball,* 89 Minn. 454, 95 N.W. 317 (1903), failed to name in her application the owner of the land who was listed in the records of the county auditor and that party's successor in interest, despite the recommendation of the examiner that these parties be named and notified. Although the name of the successor was not in the public records, the court held that the plaintiff would have learned it if she had notified the record owner. Finally, as the majority notes, *Baart v. Martin,* 99 Minn. 197, 108 N.W. 945 (1906), involved intentional fraud when the Torrens plaintiff failed to name and notify the record holder of a mortgage, of whom he was aware.

None of these nine cases imposed a duty on the Torrens applicant to search for a potential claimant beyond public records or beyond inspecting the land to ascertain who was in possession. In all of the cases, the Torrens certificate was later held to be invalid because the plaintiff failed to name and notify a claimant who was listed in public records or was in possession. The majority asserts that courts in other states have imposed a heightened duty of "diligent inquiry into the identity of all reasonably ascertainable claimants." They have not. I do not believe these cases support this claim.

III.

The correct standard to determine whether notice provided satisfies due process is articulated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and its progeny. "The means employed [to provide notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id.* at 315, 70 S.Ct. at 657-58. *Mullane* does not require that the best means of giving notice be employed, only the most reasonable. *Id.* at 317, 70 S.Ct. at 658-59. Under *Mullane*, personal service is not an indispensable element of the right to due process.[6]

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[6] The majority also relies on *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82 (1911), to support its contention that there is a duty to "make diligent inquiry to ascertain the names of all claimants." That case did not involve the Torrens Act, but rather a similar California law passed a few months after the 1906 San Francisco earthquake and resultant fires that destroyed all public records of land ownership. As the majority correctly notes, the California Supreme Court interpreted the statute to require "diligent inquiry." The actual holding of *Zeiss*, however, tends to refute the majority's position rather than support it. Zeiss, the lessee of the property in question, filed an action under the statute and

Mullane involved the question of whether beneficiaries of a trust received adequate notice of the disposition of trust accounts. The state statute only required notice by publication. The *Mullane* court held that publication notice was adequate only for those beneficiaries "whose interests or whereabouts could not with due diligence be ascertained." *Id.* In that case, the trustee was required to provide actual notice to the beneficiaries whose names and addresses were in his records. However, the court also held that publication notice was adequate for "those beneficiaries whose interests . . . could be discovered upon investigation, [but] do not in

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alleged that he was the owner of the land and knew of no other person with a claim on it. However, he made *no* inquiry to ascertain whether any adverse claim existed. In compliance with the statute, notice was published in a local periodical. Zeiss received a certificate of title. The later suit was brought by the actual owners of the property in fee simple. The lower court dismissed their claim because Zeiss had obtained title through the earlier action. After reciting the language requiring "diligent inquiry," the United States Supreme Court held the California statute tc be constitutional, *affirmed* the lower court's dismissal, and denied the true owners their title to the property. The actual result of *Zeiss* was that a petitioner under the California statute could obtain title to property even though he made no inquiry beyond publication notice to ascertain whether there were claims against the property.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), cited *Zeiss,* but differently than the majority suggests. *Mullane* quoted *Zeiss* for the proposition that notice should be practical and reasonable, but need not be given to every possible person who could conceivably have a claim:

> But if with due regard for the practicalities and peculiarities of the case these conditions [i.e., interested parties are informed of the action and have an opportunity to present their objections] are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

Mullane, 339 U.S. at 314-15, 70 S.Ct. at 657 (quoting *Zeiss*, 219 U.S. at 67, 31 S.Ct. at 207).

due course of business come to knowledge of the common trustee." *Id.* The court further stated that there was no requirement of "impracticable and extended searches" to locate those beneficiaries whose interests were remote. *Id.* One is not required to undertake "extraordinary efforts to discover the identity and whereabouts of a [claimant] whose identity is not in the public record." *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 799 n. 4, 103 S.Ct. 2706, 2711 n. 4.

Based on *Mullane* and its progeny, I find that Jack Taylor provided adequate notice to potential claimants. He not only complied with the notice requirements of the Torrens statute, but also named and notified 316 parties whose names and interests were not found in the public records. By order of the court, he also named and notified 142 additional potential claimants. The record also indicates that the title examiner actively sought to identify other potential claimants.

I conclude that Taylor's 1960 action not only satisfied due process standards, but went significantly beyond what due process required. Even if we were to read the statute to impose a requirement of reasonable diligence, I believe that reasonable diligence was exercised.

IV.

Because the interests of the "unknown" claimants were represented in the 1960 action, their due process rights were not infringed. The record indicates that the court appointed a guardian ad litem to represent the interests of the "unknown" claimants.

Moreover, because the usufructuary rights in question were the same rights shared by all of the potential claimants, the fact that most of the claimants received notice and had an opportunity to participate in the suit was sufficient to protect the interests of those who did not. "[N]otice reasonably certain to reach most of those interested in objecting is likely

to safeguard the interests of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every [claimant] are justifiable." *Mullane,* 339 U.S. at 319, 70 S.Ct. at 659-60.

The interests of the "unknown" claimants were represented in the 1960 action. As successors in interest to those "unknown" claimants, the current plaintiffs are bound by the results of that earlier decision.

V.

The plaintiffs' attempt to void the 1960 Torrens action and the majority's acquiescence in their collateral attack results in the application of an incorrect remedy. According to section 38-36-131(1), 16A C.R.S. (1982), parties in the position of the plaintiffs, who claim they should have received actual notice of the Torrens action but did not, may reopen the decree only within ninety days after entry of the decree, and not afterwards. In this case, the final decree was not entered until October 5, 1965. The plaintiffs, or their predecessors in interest, had five years from the original filing to become aware of the Torrens action. Because they did not attack the decree within the statutory ninety days, they are now prohibited from doing so.

Section 38-36-131(2), 16A C.R.S. (1982), provides the appropriate remedy. If, as the plaintiffs claim, Taylor's application in the Torrens action was made with fraudulent intent, their correct remedy is a suit for damages. "Any person aggrieved by such decree in any case may pursue his remedy by suit in the nature of an action of tort against the applicant or any other person for fraud in procuring the decree . . . ." § 38-36-131(2). Reopening the thirty-year-old decree is not the proper remedy. *See White v. Ainsworth, 62* Colo. 513, 163 P. 959 (1917).

VI.

The effect of the majority opinion is to reopen a thirtyyear-old decision and put into question the ownership of a considerable portion of the land in Costilla County. The plaintiffs' second amended complaint names as defendants not only the estate and heirs of Jack Taylor, but an additional 218 parties and "all unknown persons" who now may have ownership or other interests in the land.

It is the public policy of this state to make title to property *more* secure and marketable, not less. *See* § 38-34-101, 16A C.R.S. (1993 Supp.).

[A]ll . . . laws concerning or affecting title to real property and every interest therein and all recorded instruments, decrees, and orders of courts of record . . . shall be liberally construed with the end in view of rendering such titles absolute and free from technical defects so that subsequent purchasers . . . may rely on the record title and so that the record title of the party in possession is sustained and not defeated by technical or strict constructions.

Id. The majority opinion directly contradicts this legislative prescription by allowing a party, after any period of time, to reopen dispositions of land title. The majority does violence to this state's system of securing title and irreparably harms the marketability of land in this state. The majority opinion reaches not only titles obtained through Torrens actions, but also, by implication, all land ownership determinations made in quiet title actions. The provisions for naming defendants in quiet title actions and providing them notice differ little from similar provisions in the Torrens Act.[7]

The effect of the majority's decision is to create uncertainty in the conclusiveness of land title in this state.

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[7] *See* C.R.C.P. 105, 10(a), 9(a)(2), and 4.

VII.

The majority holds that summary judgment was inappropriate in this case because a question of fact remained as to whether Taylor exercised reasonable diligence in identifying potential claimants who should have been named parties and should have received notice of the action through service of process. The crux of the issue, as posed by the majority, is whether Taylor's efforts and the notice that he provided was adequate to reach the predecessors in interest of the current plaintiffs. The majority remands this issue to the trial court for a factual determination. This remand is an incorrect disposition of the case. The question of the sufficiency of notice is one of law, not of fact. *Closed Basin Landowners Ass 'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627 (Colo.1987); *Kavanagh v. Hamilton,* 53 Colo. 157, 125 P. 512 (1912) (holding that on collateral attack the jurisdiction of a court of record must be determined by its own record). As such, even if we choose to graft the requirement of applying reasonable diligence in locating unknown claimants onto the Torrens Act, the decision on whether Taylor exercised that reasonable diligence is a question of law for this court, not a question of fact for the trial court.

VIII.

Because I believe that the plaintiffs are prohibited by res judicata from relitigating the 1960 action, and because notice in that suit was adequate to satisfy due process, I dissent. I also cannot agree that the plaintiffs should be allowed to reopen a thirty-year-old determination of land title. Such a result would introduce chaos and uncertainty in the marketability of land in this state.

I am authorized to say that Chief Justice ROVIRA and Justice ERICKSON join in this dissent.

APPENDIX D

COLORADO COURT OF APPEALS,
DIV. IV.

No. 98CA1442

EUGENE LOBATO; Zack Bernal; Gabrielita Adeline Espinosa; Edward Espinosa; Pete E. Espinosa, Jr.; Corpus Gallegos by and through his conservator Yvette Gallegos; Gloria Gallegos; Rupert Gallegos; Raymond Garcia; Charlie Jacquez, Jr.; Adolph J. Lobato; Bonifacio "Bonnie" Lobato by and through his conservator Teresa Lobato; Carlos Lobato; Emilio Lobato, Jr.; Jose F. Lobato; Presesentacion J. Lobato; Gloria Maestas; Norman Maestas; Robert "Bobby" Maestas; Raymond J. Maestas; Eugene Martinez; Mark Martinez; Agatha Medina; Gilbert "Andres" Montoya; Shirley Romero Otero; Eppie Quintana; Lucille Samelko; Arnold Valdez; Ervin L. Vigil; Larry J. Vigil; Michael J. Vigil; Billy Alire; Robert Atencio; Frances D. Berggran-Buhrles; Jose Fred Carson; Elmer Manuel Espinosa; Margurito Espinosa; Moises Gallegos; Ruben Gallegos; Richard J. Garcia; Manuel Gardunio; Ruben Herrara; Jeffrey Jacquez; Adelmo Kaber; Crucito Maes; Daniel Martinez; David Martinez; Jesse Martinez; Leonardo Martinez; Rosendo Martinez; Solestiano Martinez; Alfonso Medina; Gilbert Medina; Leandardo Medina; Loyola Medina; Marvin Medina; Orry Medina; Raymond N. Medina; Rudy Montoya; Gurtrude C. Olivas; Eppy Wayne Quintana; Robert Romero; Shirley Romero; Anthony Sanchez; Bonnie Sanchez; Eugene Sanchez; Evan Sanchez; James Sanchez; Jose G. Sanchez; Rufino Sanchez; S.R. Sanchez; Vernon Sanchez; Ronald A. Sandoval; Elesam Santistevan; Daniel Segura; Floyd R.

Solan; Carolyn Taylor; Sam Valdez; Martha Vialpondo; Joe P. Vigil; and Walter Vigil,

Plaintiffs-Appellants and Cross-Appellees,

v.

ZACHARY TAYLOR, as executor of the Estate of Jack T. Taylor, Jr., Deceased, and The Taylor Family Partnership,

Defendants-Appellees and Cross-Appellants,

and

J. Hoy Anderson; Marvin Lavern Stohs; Edythe Kelly Stohs; Charles W. Gelderman; William F. Phinney; Harlan A. Brown; Dena F. Fuhrmann; Jimmy C. Crook; Freeland D. Crumley; Joseph P. Campisi; Hugh R. Denton; Robert Paul Resteli; Eugene J. Kafka; Avis M. Anderson; Clifford R. Jenson; Don W. Jacobs; Raymond E. Gauthier; Francis P. Heston; and Howard G. Frailey;

Defendants-Appellees.

May 11, 2000.
Certiorari Granted Dec. 4, 2000.*

Opinion by Judge VOGT.

The primary issue in this case is whether plaintiffs, owners of property in Costilla County, Colorado, have rights to use defendants' property for grazing, gathering firewood, harvesting timber, fishing, hunting, and recreation. After a bench trial, the trial court concluded that plaintiffs had no such rights and accordingly dismissed their claims. Plaintiffs have appealed the judgment of dismissal and related orders in the trial court proceedings. Defendants cross-appeal, challenging the trial court's denial of attorneys' fees and other rulings. We affirm.

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* Justice COATS does not participate.

The property at issue here, known as the Taylor Ranch, consists of some 80,000 acres of mostly mountainous land in southern Colorado. It is part of the one million acre Sangre de Cristo land grant, which was awarded by the Mexican government to Narcisco Beaubien and Stephen Luis Lee in 1844, included in the territory ceded to the United States under the Treaty of Guadalupe Hidalgo in 1848, and confirmed by Congress in 1860 as the property of Charles (Carlos) Beaubien. The history of the Sangre de Cristo grant is relevant to various issues in this case and is discussed in detail in Sections I and II, below.

Beginning in the mid-1800s, settlers in the area, including plaintiffs' ancestors and predecessors in title, grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted, and engaged in recreation on the Taylor Ranch property, which was then unfenced land.

In 1960, Jack Taylor purchased the property. That same year, Taylor filed a petition in the United States District Court for the District of Colorado to register title in his land as provided for in Colorado's Torrens Title Registration Act, § 38-36-101, *et seq.*, C.R.S.1999. The application listed over three hundred individuals as interested parties and referred to others claiming an interest in the property, including persons asserting claims to "settlement rights" by virtue of an 1863 document known as the Beaubien document.

The district court determined that the defendants had no rights in Taylor's property and entered a Final Decree of Confirmation of Title and Registration pursuant to the Torrens Act. The Tenth Circuit affirmed. *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir.1967).

After purchasing the property, Taylor had begun fencing the land and cutting off public access to it. In 1981, plaintiffs, on behalf of themselves and a class of heirs and successors in interest to the original settlers of the Sangre de

Cristo grant, filed a quiet title action in Costilla County District Court against Taylor and others who had interests in the property. Citing Mexican law and custom as well as representations made by Charles Beaubien in the Beaubien document, the complaint alleged that the Taylor Ranch was subject to community rights and uses for grazing, lumber, water, pasturing, hunting, and recreation, and that Taylor was violating plaintiffs' rights by fencing off the property and barricading the roads.

In 1985, defendants moved for summary judgment, arguing that plaintiffs' claims were barred under principles of res judicata and stare decisis because their contentions concerning their rights to the property had been litigated and rejected in Taylor's 1960 Torrens action. The trial court entered summary judgment but denied defendants' request for attorney fees. A division of this court affirmed. *Rael v. Taylor*, 832 P.2d 1011 (Colo.App.1991).

The supreme court granted certiorari and, in *Rael v. Taylor*, 876 P.2d 1210 (Colo.1994), affirmed the denial of defendants' request for fees but reversed on the res judicata issue, concluding that the division had erred by determining the question of res judicata without first deciding whether notice adequate to satisfy the requirements of due process had been provided in the 1960 Torrens action. The supreme court directed that, on remand, the trial court was to determine whether Taylor had exercised reasonable diligence in identifying and serving persons with an identifiable interest in the property in the original Torrens action.

After remand to the court of appeals for determination of additional issues concerning statutes of limitations (*see Rael v. Taylor*, (Colo.App. No. 87CA0658, Mar. 9, 1995) (not selected for publication)), the cause was returned to the trial court for further proceedings.

A bench trial was held on the res judicata/due process issues in September 1997. At the conclusion of that trial, the court ruled that some of the named plaintiffs had an identifiable interest in defendants' property, could reasonably have been ascertained and served in the 1960 Torrens action, were not properly served, and therefore were not barred under res judicata principles from pursuing their claims. The court dismissed the claims of the majority of the plaintiffs, concluding that there had been no violation of their right to notice in the Torrens action. It also denied plaintiffs' motion for class certification.

In May 1998, the case proceeded to trial on the merits of the claims of the remaining plaintiffs. Prior to the merits trial, the court entered summary judgment against plaintiffs on their claims to rights in defendants' property to the extent those claims were based on Mexican law and custom and international law. Following the trial, the court dismissed plaintiffs' remaining claims. It also denied defendants' motion for attorneys' fees.

ISSUES ON APPEAL

Plaintiffs challenge the trial court's rulings on the due process and class certification issues, the court's cost award, and its rulings on the merits of their claims. Because we conclude that the trial court did not err in dismissing plaintiffs' claims on the merits, we do not decide the issues raised by plaintiffs relating to due process or class certification. Plaintiffs have not suggested that any of the individuals who were dismissed following the due process trial had theories of relief available to them that were not available to those plaintiffs whose claims were tried on the merits. Thus, any errors in the trial court's rulings on due process or class certification would not change the result reached here.

Before turning to plaintiffs' specific contentions, addressed in Sections I-III, below, we consider briefly the nature of the property rights they claim.

The trial court characterized these rights as "profits a prendre," which is the term used at common law to refer to rights to take a part of the soil or produce of the land of another. *See Alexander Dawson, Inc. v. Fling*, 155 Colo. 599, 396 P.2d 599 (1964).

Profits a prendre include rights to pasture (that is, the right to allow one's animals to graze on the lands of another), to fish, to hunt, and to remove wood. Profits a prendre may be appurtenant to other land, with the land to which the right appertains being the dominant tenement and the land from which the profits are taken being the servient tenement, or they may exist in gross—i.e., held and enjoyed by an individual or party distinct from any ownership of land. *See generally* 8 *Thompson on Real Property* § 65.02(b)(Thomas ed.1994); 3 *Tiffany Real Property* §§ 839-845 (3d ed. 1939 & 1999 Cum.Supp.).

Like an easement, a profit a prendre is a type of servitude, that is, an encumbrance consisting of a right to the limited use of a piece of land without the possession of it. *Black's Law Dictionary* 1373 (7th ed.1999). However, as discussed below, profits and easements are not treated identically for all purposes.

Plaintiffs rely on three different bases to support their claims to rights in defendants' property. The trial court rejected the first on summary judgment, and the second and third after trial on the merits. We address each in turn.

I. *Rights Arising Prior to 1860 Based on Mexican Law and Custom*

Plaintiffs contend that the trial court erred in granting summary judgment on all claims based on rights purportedly acquired prior to 1860. We disagree.

We review a summary judgment *de novo*, applying the same standards that govern the trial court's determination. Summary judgment is warranted only when there is a clear showing that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. All doubt as to the existence of a triable factual issue must be resolved against the moving party, and the non-moving party is entitled to the benefit of all favorable inferences that may be drawn from the facts. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo.1988).

A. Factual background

In 1843, Narcisco Beaubien and Stephen Luis Lee petitioned the Mexican governor of New Mexico for a grant of land (the Sangre de Cristo grant), eventually determined to consist of some one million acres, located primarily in what is now south-central Colorado. The petition was granted. After the grantees were killed in 1847, Narcisco Beaubien's father, Charles Beaubien, inherited his son's undivided one-half interest in the property and purchased the remaining interest from Lee's estate.

In 1848, the United States and the Republic of Mexico entered into the Treaty of Guadalupe Hidalgo, ending hostilities between the two nations. The treaty provided, in relevant part, that the rights of Mexicans to property in the lands ceded to the United States would be "inviolably respected."

In order to establish a process for determining land claims within the New Mexico portion of the ceded territories,

Congress gave the surveyor general of the Territory of New Mexico the duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico" and to report to Congress on the validity of such claims, so that Congress could take action to confirm bona fide grants and give effect to the Treaty of Guadalupe Hidalgo. Act of July 22, 1854, Ch. 103, 10 Stat. 308 (1854).

In 1856, following a trial, the surveyor general concluded that the Sangre de Cristo grant was "a positive one, without any subsequent conditions attached . . . a good and valid [grant] . . . and that a legal title vests in Charles Beaubien to the land." The surveyor general recommended that the grant be confirmed by Congress. Upon that recommendation, Congress approved the Sangre de Cristo grant and confirmed title in Beaubien in 1860. Act of June 21, 1860, Ch. 167, 12 Stat. 71 (1860) (the Act of Confirmation). A patent issued in 1880.

In *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 23 L.Ed. 998 (1876), the United States Supreme Court affirmed a decision of the supreme court of Colorado territory (*Tameling v. U.S. Freehold Land & Emigration Co.*, 2 Colo. 411 (1874)) that rejected a challenge to the validity of the original grant to Beaubien's predecessors. Noting that the 1860 Act of Confirmation confirmed the grant as absolute and unconditional, the Court held that that Act was binding on the courts ("[T]he invalidity of the grant . . . was matter for the consideration of Congress; and we deem ourselves concluded by the action of that body"). *Tameling v. US Freehold & Emigration Co., supra*, 93 U.S. at 663, 23 L.Ed at 1003.

Tameling was subsequently relied on by the Tenth Circuit in *Sanchez v. Taylor, supra*, in affirming the lower court's ruling, in Taylor's original Torrens action, that any rights which the owners of land near Taylor's property might have

had under Mexican law and the Treaty of Guadalupe Hidalgo were extinguished by the Act of Confirmation in 1860.

B. Proceedings in the Trial Court

Prior to the May 1998 merits trial, defendants sought summary judgment on various issues. As pertinent here, defendants argued that, in light of *Tameling* and *Sanchez*, principles of stare decisis required the trial court to rule as a matter of law that any rights that plaintiffs' predecessors may have had under the original grant from Mexico were extinguished by the 1860 Act of Confirmation. Plaintiffs opposed summary judgment by providing the court with expert reports and other materials which they claimed established that the 1843 grant petition of Narcisco Beaubien and Stephen Luis Lee promised rights to future settlers which were recognized by the surveyor general and not extinguished by the 1860 Act of Confirmation.

The trial court granted summary judgment on this issue. It determined that, by virtue of the Act, confirmation was "absolute and unconditional" in Charles Beaubien. It then concluded that, given the Supreme Court's holding in *Tameling* that the Act was final and conclusive as to the nature and validity of the grant and not subject to judicial review, the doctrine of stare decisis required the conclusion that "any purported rights that might [have] existed ... were extinguished by the 1860 Confirmatory Act . . . and if the confirmation of title was contrary to the treaty provisions, the question was political, not judicial."

C. Analysis

On appeal, plaintiffs and their amici argue, as they did in the trial court, that the two original grantees promised to settle the grant in accordance with Mexican law and custom; that Mexican law and custom recognized that such settlers had certain community rights or settlement rights; that, in

accordance with the Treaty of Guadalupe Hidalgo, those rights were entitled to protection; and that the trial court's contrary conclusion violates both the treaty and international law. We are unpersuaded.

We note initially that, although plaintiffs' experts testified that such rights should be inferred by reference to Mexican law and custom, the relevant documents themselves contain no references to property rights of anyone other than Narcisco Beaubien, Stephen Luis Lee, and their heirs and successors in title. Nor do they contain any language expressly indicating that the original petitioners, or the Mexican government that granted the petition, intended to ensure that the settlers would have such rights.

While the 1843 petition references the petitioners' intent to promote and encourage settlement, it also states that the petitioners were seeking a decree "which will ensure to us our legal title [to the land] and prevent any one from disturbing us." Similarly, the grant from the Mexican governor awarded the petitioners "the personal and perfect possession which they solicit, serving as a title to them, their children and successors."

On its face, this language is inconsistent with an intent to grant enforceable property rights to other parties. Moreover, as noted above, the surveyor general's report recommended confirmation of Charles Beaubien's title in equally absolute terms, and did not suggest that there were any limitations on that title.

We also note that the Sangre de Cristo grant at issue here is significantly different from the "Baca grant" that was considered in *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994), on which plaintiffs rely. In that case, the Mexican government had not only granted title to the tract to an individual, Luis Maria Cabeza de Baca, but had also expressly recognized the rights and privileges

of settlers upon the grant. Further, the surveyor general had recommended confirmation of title both in the settlers and in the Baca heirs, leaving to the respective claimants the right of adjusting their conflicting claims in the courts. The 1860 Act of Confirmation did not confirm title in Baca, as it did in Beaubien for the Sangre de Cristo grant, but instead granted Baca's heirs the right to select other lands in the public domain.

The fact that the Mexican government expressly granted rights to settlers on the Baca grant, and that the surveyor general and Congress expressly acknowledged those rights, supports the conclusion that a grant of such rights to the settlers on the Sangre de Cristo grant should not be inferred in the absence of any similar express language.

Moreover, even if the surveyor general and the 1860 Congress failed to recognize rights which the settlers on the Sangre de Cristo grant might have had under Mexican law, any right to enforce these in the courts no longer exists. As the trial court recognized, *Tameling* established the finality of the 1860 Act confirming title in Beaubien and foreclosed judicial review of claims based on rights that assertedly arose before the date of the Act.

Plaintiffs argue that *Tameling* is distinguishable because John Tameling was not seeking, as they are, to enforce rights under Mexican law but, instead, was invoking Mexican law as a basis for challenging the validity of the title held by U.S. Freehold, one of Beaubien's successors. We do not view this distinction as sufficient to permit us to disregard *Tameling*'s prohibition of judicial review of challenges to the validity of titles confirmed by Congress as absolute and unconditional.

Plaintiffs also argue that the 1860 Act of Confirmation did not extinguish their claims because it relinquished only the rights of the United States government. However, notwithstanding language to that effect in the Act itself, we find it

significant that both the Supreme Court in *Tameling* and the Tenth Circuit in *Sanchez* construed the Act as extinguishing claims of private parties, not simply claims of the United States. Indeed, in *Sanchez*, the Tenth Circuit expressly considered and rejected the argument, made by the defendants in Taylor's original Torrens action, that the 1860 Act of Confirmation did not affect the adverse rights of parties other than the United States. We are not persuaded to reach a contrary conclusion here.

In sum, plaintiffs have not established a basis for distinguishing *Tameling* and *Sanchez* or for concluding that they had enforceable rights to defendants' property that survived the 1860 Act of Confirmation. Accordingly, the trial court did not err in entering summary judgment on this issue.

II. *Rights Based on the Beaubien Document*

We likewise conclude that the trial court did not err in rejecting, after a trial on the merits, plaintiffs' contention that they had enforceable use rights in defendants' property by virtue of the Beaubien document of 1863.

A. Factual Background

Prior to 1860, Charles Beaubien had sold numerous small parcels of land to various settlers who had come to the area, and had conveyed other property interests as well. For example, in 1856, Beaubien leased a parcel of land to the U.S. Army for twenty-five years, and included in the lease a statement that the U.S. Government was to have "the further privileges, during the occupancy of said [Army Post], to pasture, cut grass, timber and firespace [sic] wood, upon any adjacent land belonging to us."

On May 11, 1863, Beaubien executed a document written in Spanish (the Beaubien document) setting forth certain rights and privileges to be had by settlers residing in towns

located within the boundaries of the grant. In the translation relied on by plaintiffs, the document provides in pertinent part as follows:

> Plaza of San Luis de la Culebra, May 11, 1863.
>
> It has been decided that the lands of the Rito Seco remain uncultivated for the benefit of the community members (*gente*) of the plazas of San Luis, San Pablo and Los Ballejos and for the other inhabitants of these plazas for pasturing cattle by the payment of a fee per head, etc. and that the water of the said Rito remains partitioned among the inhabitants of the same plaza of San Luis and those from the other side of the vega who hold lands almost adjacent to it as their own lands, that are not irrigated with the waters of the Rio Culebra. The vega . . . will remain for the benefit of the inhabitants of this plaza and those of the Culebra as far as above the plaza of Los Ballejos . . . . Those below the road as far as the narrows will have the right to enjoy the same benefit . . . . [No one may] place any obstacle or obstruction to anyone in the enjoyment of his legitimate rights . . . . Likewise, each one should take scrupulous care in the use of water without causing damage with it to his neighbors nor to anyone. According to the corresponding rule, all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another . . . .

The document, signed by Beaubien and two witnesses, was recorded in the grantor/grantee index of Costilla County.

After Beaubien died in 1864, his heirs conveyed all the unsold Sangre de Cristo grant property to William Gilpin. The instrument of conveyance included a statement that "certain settlement rights before then conceded by said Charles Beaubien . . . shall be confirmed by said William Gilpin."

Between 1864 and 1960, Gilpin and his successors in interest sold most of the remaining property. In 1960, when

Jack Taylor purchased one of the few remaining large parcels of undivided and unfenced land, his deed contained the following statement: "All of the land hereby conveyed being subject to rights of way of record and . . . also subject to claims of the local people by prescription or otherwise to rights to pasturage, wood, and lumber and so-called settlement rights in, to, and upon said land . . . ."

In its opinion affirming the district court's ruling in Taylor's Torrens action, the Tenth Circuit held that the Beaubien document did not evidence an intent to dedicate or grant the privileges claimed by the defendants. *Sanchez v. Taylor, supra.*

B. Trial Court Proceedings

Defendants sought summary judgment on this issue prior to the merits trial. They argued that, as a matter of law, the 1863 Beaubien document created no rights to the Taylor Ranch property. Finding that this issue was "the crux of the litigation," and that there were many disputed issues of fact to be resolved by the trier of fact, the trial court denied summary judgment.

This claim was the primary focus of the merits trial in May 1998. Plaintiffs offered testimony of lay and expert witnesses in support of their contention that the Beaubien document created rights to the property that were enforceable by the plaintiffs. Defendants' only witness was Zachary Taylor, executor of the estate of his father, Jack Taylor, and manager of the Taylor Ranch.

Following the trial, the court made written findings and conclusions and entered judgment in favor of defendants. As pertinent to this issue, the court found that: (1) plaintiffs' predecessors in title grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted, and recreated on defendants' land from the 1800s until the land was acquired

by Jack Taylor in 1960; (2) none of the land was fenced prior to 1960, and plaintiffs were never denied access to the land for the uses enumerated above; and (3) the chain of title of all land now owned by plaintiffs and defendants extended from Carlos Beaubien in 1863.

The court concluded that the Beaubien document, which it found "not an ambiguous paper on its face as it pertains to the land now owned by [defendants]," was not a document of conveyance of any use rights on defendants' land. In support of that conclusion, the court stated that: (1) the document did not mention fishing, hunting, or recreating, which, as profits a prendre, had to be expressed in writing to vest; (2) none of the locations mentioned in the document were on defendants' land; (3) the 1856 lease from Beaubien to the U.S. Government showed that Beaubien knew how to convey use rights or profits a prendre; (4) language in Jack Taylor's deed stating that he took the property "subject to" claims of the local people did not refer to any right, but only that the plaintiffs claimed to have a right; and (6) plaintiffs had not borne their burden of proving that Beaubien intended to do anything with the property except keep it for himself.

C. Analysis

Plaintiffs state on appeal that, because three of the rights they claim (hunting, fishing, and recreation) are not expressly granted in the Beaubien document, they are not asserting claims to these rights under the document but, instead, are claiming these rights by prescription. They maintain, however, that the Beaubien document was sufficient to convey enforceable rights to pasture, firewood, and timber on defendants' property, and that the trial court erred in concluding otherwise. We do not agree.

1. *The Beaubien document did not satisfy the requirements of Colorado law in 1863 for validly conveying interests in real property.*

We note initially that, although much of the focus of plaintiffs' argument on this issue is on Mexican law and custom, the validity and effect of the Beaubien document itself is determined by Colorado law. *See De Mares v. Gilpin*, 15 Colo. 76, 24 P. 568 (1890) (plaintiff's rights to land in Colorado were determinable under the laws of Colorado; thus, she could not rely on her disability as a married woman under the customs and law of New Mexico to excuse her failure to prosecute her claim to the land); Restatement (Third) of Property: Servitudes § 2.1, at 4 (Tent. Draft No. 1, 1989) ("to create a servitude, a contract or conveyance must meet local law requirements for contracts or conveyances involving interests in land").

Under the law in effect in Colorado territory in 1863, a document conveying any interest in real property had to meet certain formal requirements, including the requirement that it contain "the christian and surnames of the . . . grantees . . . and . . . an accurate description of the premises, or the interest in the premises intended to be conveyed." General Laws of the Territory of Colorado, Act Concerning Conveyances of Real Estate, § 2 (1861).

The Beaubien document does not give the "christian and surnames" of the grantees, but simply refers generally to the "community members" and "inhabitants" of the villages. Moreover, the document does not identify, as the property to be burdened, any lands that subsequently became part of the Taylor Ranch. Although, as discussed below, plaintiffs sought at trial to establish that the original settlers and their successors interpreted the Taylor Ranch as the servient estate, it is undisputed that the specific locations referenced in the document are not on defendants' property.

Further, to the extent the rights purportedly granted in the Beaubien document are profits a prendre in gross-that is, personal rights held distinct from any ownership of land-the document did not contain language required under then-existing Colorado law to pass such rights on to the original inhabitants' successors, including plaintiffs.

Under Colorado law prior to 1868, the absence of the words of limitation "and heirs and assigns" in a document conveying an interest in real property meant that the conveyance passed only a life estate. *See In re Newby's Estate*, 146 Colo. 296, 361 P.2d 622 (1961). Although the Beaubien document refers to community members and inhabitants, it does not state that any property rights conveyed to these individuals were to pass to their heirs and assigns; thus, the document could at most have conveyed a life estate in profits a prendre in gross.

Plaintiffs point out that the common-law rule requiring words of inheritance was abolished in Colorado by statute in 1868. However, the repealing statute, 1868 Colo. Tern L. ch. XC, p. 693, contained a saving clause providing that "as to all rights and titles accrued ... while the same remained in force, all such acts and parts of acts, heretofore repealed, shall be construed to be and remain in force, notwithstanding any such repeal."

2. *The trial court did not err in excluding extrinsic evidence regarding the Beaubien document.*

Plaintiffs contend that the trial court erroneously refused to hear their extrinsic evidence before deciding whether the Beaubien document was ambiguous. They assert that their evidence would have established Beaubien's intent and would have proven, among other things, that the Taylor Ranch property was the servient estate contemplated in the document.

In support of their argument that the court was required to consider extrinsic evidence before deciding whether the Beaubien document was ambiguous, plaintiffs rely primarily on *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo.1998). We conclude that the trial court's rulings concerning plaintiffs' extrinsic evidence were not improper under *Lazy Dog Ranch.*

In *Lazy Dog Ranch,* the supreme court addressed the use of extrinsic evidence to ascertain the intended use of an easement that had been expressly granted in a warranty deed. Apart from the fact that profits a prendre are not necessarily treated in the same way as easements, we do not read *Lazy Dog Ranch* as mandating consideration of extrinsic evidence where the document at issue is unambiguously insufficient on its face, under then-existing law, to convey the claimed rights. The supreme court cautioned that the instrument conveying an interest in land is to be the primary source of information, and that in cases where the document of conveyance itself specifically addresses the issue, "there will be no need to look at the surrounding circumstances." *Lazy Dog Ranch v. Telluray Ranch Corp., supra*, 965 P.2d at 1236.

Moreover, even though the trial court found the Beaubien document "patently unambiguous," it did in fact allow extensive extrinsic evidence, including expert testimony, bearing on the issue which plaintiffs characterize as central to this claim-namely, the location of the intended servient estate in the Beaubien document. The trial court stated:

> The court . . . finds that the document itself is patently unambiguous. It's very clear as to what it means. But, as far as any latent ambiguity is concerned, I don't know, and I won't know until after I hear from the witness, as to the application of the document to the geography of the—of the land, is a subject that I will admit—to which I will admit parol evidence.

In accordance with the court's ruling, plaintiffs' expert testified to the bases for her opinion that the land that presently comprises the Taylor Ranch had to be the land on which the settlement rights were to be exercised.

Thus, to the extent extrinsic evidence was relevant to whether the Taylor Ranch property was the intended servient estate in the Beaubien document, the court in fact permitted plaintiffs to put on such evidence. Upon review of the testimony of plaintiffs' expert as well as the additional expert opinions and materials proffered by plaintiffs that are in the record on appeal, we agree with the trial court that this evidence did not establish that the Beaubien document conveyed the rights claimed by plaintiffs.

3. *Plaintiffs did not establish that the Beaubien document created any rights by implication.*

Plaintiffs contend that, even if the Beaubien document did not satisfy the formal requirements for a conveyance of the rights they claim, the trial court should have found such rights by implication. They argue, for example, that the rights which Beaubien intended to convey may be inferred from evidence of the use to which the subject property was put by the inhabitants of the area for nearly 100 years, and that their claimed rights may be deemed to have arisen by implication as part of Beaubien's overall plan for development of the area. We do not agree.

In support of this argument, plaintiffs rely on *Proper v. Greager*, 827 P.2d 591 (Colo.App.1992), and other authorities that have recognized implied easements based on preexisting use. However, as discussed in further detail in Section III below, the claimed rights in this case are not subject for all purposes to the rules applicable in easement cases.

Although profits a prendre have some of the characteristics of easements and are often governed by the same rules, the

two interests are not the same. Tiffany explains the difference as follows:

> A profit a prendre, when attached to another estate, is in the nature of an easement, but not technically such. [A]n easement is a privilege without a profit. It involves primarily the doing of a certain act on or to the detriment of another's land, or the right of having another refrain from doing a certain act on or in connection with his own land . . . . One of the distinguishing features of the pure easement is the absence of all right to participate in the profits of the soil charged with it; the existence of a privilege without profit. The distinguishing feature of the profit a prendre is the right to appropriate and take from the land charged with it a part of the soil or product of it in which there is supposable value . . . . Each implies such estate in the land as may be necessary to the enjoyment of the right. Each is incorporeal real property.

3 *Tiffany Real Property, supra*, § 840, at 429.

In *Alexander Dawson, Inc. v. Fling, supra*, the Colorado supreme court held that a deed granting easement rights to boat and swim on a lake did not grant the right to fish. The court explained:

> Profits a prendre involve a greater interest than easements . . . . [Rights to boat and swim] . . . were merely easement rights; and a construction of the deed which would grant [defendants] the right to fish . . . would invest them with a greater right, a profit a prendre, a right to which they were not entitled. *A right to profits a prendre must be expressly granted; the burden of an easement may not be increased by investing the holder of such easement with a profit a prendre either by implication or otherwise.*

Alexander Dawson, Inc. v. Fling, supra, 155 Colo. at 603-04, 396 P.2d at 601 (emphasis added). In light of *Fling*, the trial

court properly rejected plaintiffs' arguments that it should find profits a prendre by implication.

In sum, the Beaubien document was insufficient on its face to convey the rights claimed by plaintiffs on defendants' property. The trial court did not improperly reject extrinsic evidence bearing on the issue. Moreover, because of the nature of those rights, the trial court did not err in declining to find that the document created rights by implication.

III. *Rights Based on Prescription*

Plaintiffs contend, in the alternative, that they have prescriptive rights to use defendants' property and that the trial court's conclusion to the contrary was error. Again, we disagree.

A. *Trial Court Proceedings*

In July 1997, plaintiffs sought leave to file a third amended complaint which, for the first time, included a separate claim for relief asserting rights to the subject property on a theory of easements by prescription. Noting that plaintiffs' motion was filed less than two months before trial, the court denied leave to amend, stating:

> The plaintiffs had 16 years to perform discovery and define the issues to be tried. To make drastic changes in the complaint by adding six new claims for relief at the 11th hour would necessitate a delay in the trial of this acrimonious, 17-year-old dispute and that would not best [sic] the interest of justice.

At the beginning of the merits trial, plaintiffs again asserted that, by virtue of the continuous exercise of the rights by themselves and their predecessors in title, they had enforceable rights to defendants' property under the law of prescription. The court allowed them to put on evidence in support of this alternative theory. In accordance with that ruling, individual plaintiffs testified at trial regarding use of

defendants' property by their predecessors and themselves for grazing and other purposes.

In its written order following the trial, the trial court reiterated its earlier determination that plaintiffs would not be permitted to present an alternative theory of use by prescription because such theory was offered without adequate notice to defendants.

The court further concluded that, even if it were to consider the evidence and amend the pleadings to conform to the evidence, plaintiffs' theory of prescription would still fail. First, the rights asserted by the plaintiffs were profits a prendre, which had to be expressly granted and could not be acquired by prescription. Second, even if the claimed rights were subject to creation by prescription, plaintiffs had failed to bear their burden of proof as to adversity, an essential element of a prescription claim.

B. *Analysis*

On appeal, plaintiffs challenge both the trial court's refusal to permit them to assert their prescription claim and the court's alternative ruling that, even if it were to consider the claim, plaintiffs had not established any use rights to the subject property under a theory of prescription. Because we agree with the trial court's conclusion as to the merits of plaintiffs' prescription claim, we need not decide whether denial of the motion to file a third amended complaint asserting that claim was an abuse of discretion.

Plaintiffs contend that the trial court erred by relying on *Alexander Dawson, Inc. v. Fling, supra*, for the proposition that profits a prendre may not be established by prescription. They argue that *Fling* and the other cases on which the trial court relied apply, at most, to profits a prendre in gross and do not preclude acquisition by prescription of the rights they claim, which they characterize as profits appurtenant to their

ownership of properties deeded by Beaubien to the settlers of the Sangre de Cristo grant.

Profits a prendre in gross cannot be acquired by prescription. *Deseret Livestock Co. v. Sharp*, 123 Utah 353, 259 P.2d 607 (1963). Nor can the public in general acquire a right to profits a prendre by prescription. *See* 3 *Tiffany Real Property, supra*, § 842, at 433 ("there can be no prescriptive right of profit in the public"); § 936, at 624 ("a right to take profits from land, as distinct from the mere right to use the land, cannot be established by custom, since the effect of such a custom would be to exhaust the profits"). The Tenth Circuit relied on this principle when it observed, in the appeal in Taylor's Torrens action, that it was "settled that the public cannot acquire by custom or common prescription profits a prendre in another's land." *Sanchez v. Taylor, supra, 377* F.2d at 738.

Thus, we agree with the trial court that, to the extent the rights claimed by plaintiffs are deemed profits a prendre in gross or are "public rights," they cannot be acquired by prescription.

Moreover, even if plaintiffs' claimed rights are properly characterized as profits appurtenant, and even if, notwithstanding the broad language in *Alexander Dawson, Inc. v. Fling, supra*, profits appurtenant can be acquired by prescription in the same way as prescriptive easements, we conclude that the trial court did not err in ruling that plaintiffs failed to establish their prescriptive claims.

A judgment of a trial court as to the existence of a prescriptive easement will not be disturbed on review if it is based on competent evidence in the record. *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo.App.1986).

Relying on the standards applicable to prescriptive easements, plaintiffs assert that they could establish their claims by proving continuous, open, and adverse use of the

claimed rights for the statutory period of eighteen years. *See Rivera v. Queree*, 145 Colo. 146, 358 P.2d 40 (1960); *Proper v. Greager, supra.* They further contend that, under *Trueblood v. Pierce*, 116 Colo. 221, 179 P.2d 671 (1947), and related authorities, a showing that they or their predecessors had used defendants' property for more than eighteen years raised a presumption that such possession was adverse, and that the trial court erred in declining to apply the presumption of adversity in this case. We agree with the trial court that application of that presumption was unwarranted in the circumstances presented here.

Use of unfenced land for grazing and the like, even for the statutory period, is insufficient to raise a presumption of adversity. *See Smith v. Town of Fowler*, 138 Colo. 359, 367, 333 P.2d 1034, 1038 (1959) ("the pasturage of cattle on unfenced land cannot be regarded as hostile and adverse to the owner of such land"); *Simon v. Pettit*, 651 P.2d 418 (Colo.App.1982) (since land in question was vacant, unenclosed, and unoccupied, presumption of adversity was inapplicable in action for declaratory judgment that footpaths crossing defendants' land had become public highways by prescription), *aff'd*, 687 P.2d 1299 (Colo.1984); *see also Palmer Ranch, Ltd. v. Suwansawasdi*, 920 P.2d 870, 873 (Colo.App.1996) ("when the boundaries of land claimed by adverse possession are not established by fences, an adverse claimant may not claim any property not actually occupied for the statutory period").

Plaintiffs argue that these cases are inapplicable because the Taylor Ranch, although unfenced, was supervised by ranch managers before 1960, and was thus not "unoccupied." They further assert that their "grazing practices were so substantial as to put Jack Taylor on notice of a duty to name and serve [them] in the Torrens action." We conclude that neither of these facts is sufficient to warrant application of a presumption of adversity in this case. Here, plaintiffs and

their predecessors were using, not a driveway over an individual's property, as in *Trueblood*, but undefined portions of some 80,000 acres of unfenced mountain land.

Because the presumption of adversity did not apply, the burden was on plaintiffs to establish that element of their claim. *See Palmer Ranch Ltd. v. Suwansawasdi, supra.* The record supports the trial court's conclusion that they did not do so. Although there was testimony at trial regarding use of the property for grazing and other purposes, there was also evidence presented that activities on the property prior to 1960 were pursuant to leases, permission of the landowners, or other arrangements. Thus, because there is evidence in the record to support the trial court's determination that plaintiffs did not establish adversity, that determination will not be disturbed on appeal. *See Durbin v. Bonanza Corp., supra.*

IV. *The Cost Award*

Although our conclusion that plaintiffs did not establish their claims to use rights on defendants' property makes it unnecessary to address the merits of the due process and class certification issues, we must still consider plaintiffs' challenge to the trial court's cost award.

We note initially that, although defendants sought an award of mandatory costs pursuant to §§ 13-16-105, 13-16-107, and 13-16-122, C.R.S.1999, following the due process trial in 1997, and again moved for costs after the merits trial, the court order awarding costs does not set forth the basis for the award. On appeal, both sides appear to view the award as having been made pursuant to C.R.C.P. 54(d), which states that, except when express provision therefor is made in a statute or rule, costs "shall be allowed as of course to the prevailing party unless the court otherwise directs."

A.

Plaintiffs first contend that costs should not have been awarded to defendants in connection with the due process trial because defendants were not the prevailing party. We are unpersuaded.

A prevailing party is one who has succeeded upon a significant issue presented by the litigation and has achieved some of the benefits sought in the lawsuit. *National Canada Corp. v. Dikeou*, 868 P.2d 1131 (Colo.App.1993). If each party prevails in part, an award of costs is committed to the sole discretion of the trial court. *Husband v. Colorado Mountain Cellars, Inc.*, 867 P.2d 57 (Colo.App.1993).

Here, of the plaintiffs whose claims were litigated in the due process trial, only a few individuals established that their due process rights had been violated in the original Torrens action and thus escaped dismissal of their claims at that stage in the proceedings. In these circumstances, it was not an abuse of discretion for the trial court to conclude that defendants were the prevailing party in the due process trial, and to assess costs against the plaintiffs who were dismissed.

B.

Nor do we agree with plaintiffs' contention that certain costs related to defendants' expert should not have been assessed because the expert testified to legal issues that were not properly the subject of expert testimony.

The expert to whom plaintiffs refer testified regarding the steps a reasonably prudent applicant in a Torrens action would take to ascertain the names of persons who claimed an interest in the property. It was not an abuse of discretion for the trial court to permit expert testimony on this issue and to rely on that testimony in reaching its conclusions on the due process issues. *See* CRE 702; *People v. Fasy*, 829 P.2d 1314 (Colo.1992). Thus, the witness fees incurred in connection

with that expert were properly included in the cost award. *See* § 13-16-122(1)(g), C.R.S.1999.

C.

We are similarly unpersuaded by plaintiffs' contention that the trial court abused its discretion in rejecting their proposal for a pro rata apportionment of costs and, instead, assessing costs against all the dismissed plaintiffs jointly and severally.

Whether to allocate costs on a pro rata basis is discretionary with the trial court. *See Winkler v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152 (Colo.App.1995). In *Winkler* and in *Bohrer v. DeHart*, 943 P.2d 1220 (Colo.App.1996), divisions of this court rejected arguments that it was an abuse of discretion to award costs jointly and severally rather than apportioning the costs. Similarly here, we conclude that it was within the trial court's discretion to decline plaintiffs' request for a pro rata apportionment of costs.

ISSUES ON CROSS-APPEAL

In light of our resolution of the issues on appeal, we address only those issues on cross-appeal relating to defendants' claim for attorney fees.

Defendants assert that plaintiffs' claims are frivolous and groundless within the meaning of *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo.1984), and that the trial court therefore erred in denying their request for attorney fees pursuant to § 13-17-102, C.R.S.1999. They further contend that, under the version of § 13-17-102 in effect at the time this action was filed, they were entitled to a hearing and findings on their claim for fees. Finally, they assert that they are entitled to their attorney fees on appeal. We disagree with each contention.

Whether to award attorney fees under § 13-17-102 is a matter committed to the discretion of the trial court. The trial

court's decision will be upheld on appeal if it is supported by the evidence. *M Life Insurance Co. v. Sapers & Wallack Insurance Agency, Inc.*, 962 P.2d 335 (Colo.App.1998).

A claim is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. Similarly, a claim is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *Western United Realty, Inc. v. Isaacs, supra.*

Like the courts that have rejected defendants' attorney fee claims at prior stages in these proceedings, *see Rael v. Taylor, supra*, we conclude that plaintiffs' claims, although ultimately unsuccessful, were neither groundless nor frivolous. Plaintiffs offered both rational argument, based on legal authority, and credible evidence in support of their claims, and in fact prevailed on some issues during the long history of this case. The fact that we have determined that plaintiffs are not entitled to relief does not make their claims frivolous.

We thus conclude that it was not an abuse of the trial court's discretion to deny defendants' request for attorney fees. Further, because the record before us adequately establishes that plaintiffs' claims were neither frivolous nor groundless, any error on the part of the trial court in declining to hold a hearing or make findings in support of its denial is harmless.

We similarly conclude that the appeal is not frivolous, and therefore deny defendants' request for their appellate attorney fees pursuant to C.A.R. 38(d). *See Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925 (Colo.1993).

The judgment is affirmed.

Judge MARQUEZ and Judge ROY concur.

APPENDIX E
COLORADO COURT OF APPEALS,
DIV. V.

No. 87CA0658

APOLINAR RAEL, Rosendo Martinez, Joseph E. Medina, Daniel Segura, Gilbert Medina, Loyola Medina, Juan LaCoombe, Bonnie Lobato, Walter Vigil, Eugene Lobato, Rudy Montoya, Clorindo Martinez, Adelmo Kaber, Emilio Lobato, Leandardo Medina, Alfanzo Medina, Rupert Gallegos, Gloria Gallegos, Robert Atencio, Frank Sanchez, Bentura Roybal, S.R. Sanchez, Leonides Atencio, Cruicito Maez, Henry Lobato, Vernon Sanchez, Ruben Herrera, Billy Alire, Willie Alire, Richard Garcia, Eppy Quintana, Willie Ray Montoya, Pete E. Espinoza, Raymond J. Maestas, Bobby Maestas, Shirley Romero, Marvin Medina, Manuel Gardunio, Leonardo Martinez, Tonita Garcia, Orry Medina, Raymond Garcia, Floyd R. Solan, Adolph J. Lobato, Presentacion Lobato, Elesam Santistevan, Raymond N. Medina, Agatha Medina, Juan DeHerrera, Hubert J. Martinez, Emejido Vialpando, Joe P. Vigil, Larry J. Vigil, David Martinez, Charlie Jaquez, Jr., Ervin L. Vigil, Manuel Maestas, Pete Lobato, Anthony Sanchez, Emilio DeHerrera, Jose F. Lobato, Eugene Sanchez, Gerald Sanchez, Lawrence Vialpando, Bonnie Sanchez, Jose G. Sanchez, Elmer Manuel Espinoza, James Sanchez, Gilbert Herrera, Robert Romero, Carlos Lobato, Andres Montoya, Bert Maestas, Henry Rodriguez, Michael J. Vigil, Jose R. Torres, Manuel Vigil, Evan Sanchez, Solestiano Martinez, Rufino Sanchez, Arnold Valdez, Caroline Taylor, Martha Vialpando, Mark Martinez, Jesse Martinez, Ruben Gallegos, Joe A. Gallegos, Moises Gallegos, Margarito Espinoza, Sam Valdez, Jose F. Carson, Ronald A.

Sandoval, Daniel Martinez, Frances D. Berggran, Maria Jaquez, J.R. Jaquez, Alberto Quintana, Jeffrey Jaquez, Frank Olivas, Gertrude C. Olivas, individually and as representatives of the Class of Heirs and successor in interest to the original settlers of the Sangre de Cristo Grant,

Plaintiffs Appellants and Cross Appellees,

v.

ZACHARY TAYLOR, as Executor of the Estate of Jack T. Taylor, Jr., Deceased,

Defendant-Appellee and Cross Appellant.

Dec. 5, 1991.
Rehearing Denied Jan. 16, 1992.
Certiorari Granted July 7, 1992.

Opinion by Judge PLANK.

Plaintiffs appeal the summary judgment dismissing their complaint to quiet title against defendants. The defendants cross-appeal the denial of attorney fees by the trial court. We affirm.

This quiet title action was filed in March 1981. The plaintiffs prayed for a decree to quiet title to certain usufructuary rights including grazing, hunting, fishing, timbering, firewood gathering, and recreation on land owned by Jack T. Taylor, Jr. The claims were made on behalf of the heirs and successors in interest to the settlers on the "Sangre de Cristo" land grant and under the "Treaty of Guadalupe Hidalgo."

The land consists of two parcels located in Costilla County, Colorado: the "Mountain Tract" and the "Salazar Estate." The parcels are adjacent to each other and are commonly known as the "Taylor Ranch."

In 1965, the U.S. District Court entered a Torrens Title Action Decree quieting title to the Mountain Tract in Jack T. Taylor, Jr. *(Taylor v. Jacques*, Action No. 6904) (Mountain Tract Action). The decree was affirmed by the Federal Court of Appeals in *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir.1967). The Salazar Estate was similarly subject to a quiet title action in 1960, quieting title to Taylor's predecessors in title (Salazar Action).

The defendants in the Mountain Tract Action and those in the Salazar Action were almost identical. None of the defendants were in possession of the lands or appear in the respective chains of title. They, like the plaintiffs in this action, claimed usufructuary rights based on the Sangre de Cristo land grant and the Treaty of Guadalupe Hidalgo.

By defendant's motion, the trial court granted summary judgment in this action dismissing plaintiffs' complaint, in part, on the basis of *res judicata.*

I.

Plaintiffs contend the trial court erred in barring their claims by *res judicata* because they were not properly given notice in the Mountain Tract Action and, therefore, were not parties to that litigation. To bar them from litigating the current action, plaintiffs argue, is a denial of their due process rights. We disagree.

Under the doctrine *res judicata*, a prior judgment is an absolute bar to the prosecution of a second action on the same claim or demand between the same parties or their privies, not only as to matters actually litigated but also to every matter which might have been litigated in the prior action. *People in Interest of G.K.H.*, 698 P.2d 1386 (Colo.App. 1984); 18 C. *Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction* § 4402 (1981).

To operate as a bar, the prior action had to have involved an identity of subject matter; identity of cause of action; identity of parties to the action; and identity of capacity in the parties for whom or against whom the claim is made. *Newby v. Bock*, 120 Colo. 454, 210 P.2d 985 (1949).

As to the first identity, the subject matter of the Mountain Tract Action and that of the Salazar Action are identical to the subject matter involved here. The Mountain Tract Action involved the title to "land situated in the County of Costilla, State of Colorado embracing approximately 77,524 acres, commonly known as the Mountain Tract." The Salazar Action involved title to the Salazar Estate. Title to both properties is involved in this case.

As to the second identity, the cause of action asserted by plaintiffs in the instant action is identical to the cause of action alleged in both of the previous actions. This cause of action has been litigated and final judgment has been entered.

Here, plaintiffs assert rights to the Taylor Ranch including grazing, hunting, lumbering, firewood gathering, pasturing, and recreation. Plaintiffs allege these rights derive from "Spanish law, Mexican law, the custom of Mexico and Spain, the terms of the Sangre de Cristo Grant, express and implied, of the original grantees and their successors, all as guaranteed to the plaintiffs by terms of the Treaty of Guadalupe Hidalgo . . . . ."

In the prior title action, the defendants claimed the same rights to Mountain Tract. As noted by the Tenth Circuit in the appeal: "[I]n their answer, defendants claimed unlimited equitable rights upon this land with respect to grazing cattle, taking timber, hunting, fishing, water, and recreational uses." *Sanchez v. Taylor, supra.* Denial of these rights was affirmed by the Court of Appeals:

> We find no error in the trial court's conclusion that appellants, as a matter of law, have no rights in Taylor's

> land under Mexican law or the original grant. Any conflicting rights prior to the Confirmatory Act of 1860 which might have arisen or existed by reason of the original grant from Mexico, considered in the light of Mexican law and the Treaty of Guadalupe Hidalgo, were thereby extinguished.

Sanchez v. Taylor, supra.

Similarly, in the Salazar Action, the court decreed "that each of the defendants has no right, title, or interest in or to said real property . . . [and] they are forever enjoined from asserting any claim, right, title, or interest in or to said real property." Defendants did not appeal that determination.

Plaintiffs argue that they were not named, served, or in privity with the parties to the previous actions, and therefore, they are not barred from litigating the present claim. Again, we disagree.

The third identity of *res judicata* is an identity of parties or their privies. *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973). And, in cases in which the subject matter of the litigation is property, successors in interest to that property are in privity of estate with the parties to the litigation. *See Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962); *Brian v. Valley View Cattle Ranch, Inc.*, 35 Colo.App. 428, 535 P.2d 237 (1975).

'When a judgment establishes the law of the case ... it becomes a rule of property as to the subject matter of the suit, and passes with it to all persons subsequently claiming under such parties . . . .'

Green v. Chaffee Ditch Co., supra; (quoting *Craddock v. Palmer*, 91 Colo. 79, 11 P.2d 807 (1932)).

Plaintiffs' claim here is based on their asserted status as successors in interest to the Mountain Tract and Salazar defendants. Thus, although not a party to the previous actions, the group of plaintiffs in the instant action are in

privity with the Mountain Tract and Salazar defendants by virtue of their claims of succession in interest to the property under the Sangre de Cristo Grant and the Treaty of Guadalupe Hidalgo. The decrees quieting title against defendants in the previous actions are therefore binding on plaintiffs as parties in privity.

The fourth identity, the capacity of the parties, is not at issue here. We conclude that each of the identities has been satisfied. Therefore, we hold that plaintiffs' claims are barred by the doctrine of *res judicata.*

In light of our holding, we need not discuss plaintiffs' remaining contentions on appeal.

II.

Defendant argues that the trial court erred in not awarding him attorney fees. They allege that plaintiffs' complaint was frivolous and vexatious and that, therefore, they should be awarded attorney fees pursuant to § 13-17-102, C.R.S. (1987 Repl. Vol 6A).

Here, the trial court did not find the action to be groundless or frivolous as there is legal authority to support some of the issues alleged by the plaintiffs. Review of the record reveals sufficient evidence to support the trial court's ruling.

Judgment affirmed.

JONES and NEY, JJ., concur.

APPENDIX F

DISTRICT COURT FOR THE COUNTY OF COSTILLA
STATE OF COLORADO

[Filed Jun. 15, 1998]

Civil Action No. 81 CV 5

PETE ESPINOZA, JR., BONNIE LOBATO, EUGENE LOBATO, EMILIO LOBATO, JR., MICHAEL J. VIGIL, NORMAN MAESTAS, and EUGENE MARTINEZ,

Plaintiffs,

and

CORPUS GALLEGOS and ZACK BERNAL,

Intervenors,

v.

ZACHARY TAYLOR, as Executor of the Estate of JACK T. TAYLOR, JR., Deceased, *et al.*

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The plaintiffs brought this action in 1980 to quiet title to land owned by the defendant, asserting that they had usafunctory interests in the defendant's land to fish, hunt, recreate, gather firewood, harvest timber and graze cattle and sheep.

Their claims, as set forth in their Second Amended Complaint are based upon the laws of Mexico and Spain, the custom of the people of the area, by grant and dedication, expressed and implied and by guaranty under the Treaty of Guadalupe Hildago.

On the first day of trial, the plaintiffs alleged an alternative theory of recovery, i.e., "Plaintiffs assert that the rights were established under the law of prescription by the continuous use of the rights by the plaintiffs' predecessors in title and the plaintiffs themselves." To this the defendant objected on several grounds, including this Court's order denying the plaintiffs Motion to File a Third Amended Complaint alleging in substance the same claim.

The Court, by order responding to the defendant's Motion for Summary Judgment, in part concluded that the 1860 congressional confirmation of title to Charles (Carlos) Beaubien extinguished any rights the plaintiffs or other may have had to the defendant's land prior to 1860.

The defendant, at the close of trial moved for an order declaring the claims of plaintiffs to be groundless and frivolous, and requested attorney fees.

The Court bifurcated the trial and commenced the due process—res judicata portion on September 23, 1997. A proceeding on the merits that began on May 18, 1998 concluded on May 28, 1998.

The Court now being fully advised in the premises issues its findings, conclusions and order.

FINDINGS

The Court finds the following facts common to all plaintiffs:

1. The plaintiffs or their ancestor predecessors in title were owners of real property with an identifiable interest in 1960, prior to the commencement of the Taylor Torrens Title Action.

2. The plaintiffs' predecessors in title grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted and recreated on the land of the defendant from the 1800's to the date the land was acquired by the defendant, in 1960.

3. None of the defendant's land was fenced prior to 1960, and the community referred to it as open range.

4. The plaintiffs were never denied access to the land for grazing of cattle, sheep, harvesting timber, gathering firewood, fishing, hunting or recreating.

5. The plaintiffs claim their right to use the land emanated from historical use and the provisions of the Beaubien Paper.

The court finds the following facts common to Eugene Lobato, Emilio Lobato, Bonnie Lobato and Michael Vigil:

1. The above named plaintiffs or their predecessors in title were named parties, and were served with process in the 1960 Taylor Torrens Title Action, and their claims to right of the mountain tract are barred by the doctrine of res judicata.

2. These plaintiffs or their predecessors in title grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted and recreated on the Salazar Estate from 1940 to 1960.

The Court further finds:

1. From the testimony of Arnold A. Valdez that the vegetation pattern of the defendant's land is the same as that on the land north and adjacent thereto.

2. Emilio Lobato and Eugene Lobato have adjudicated right to water from streams where the headgates and points of diversion are on the defendant's land, and these plaintiffs, for more than 20 years prior to 1960 used the existing roads on the defendant's land to maintain the ditches and headgates appurtenant to these adjudications.

3. Only a portion of the Salazar Estate was fenced prior to 1960, and that was for the purpose of fencing grazing animals out of the crop growing area.

4. The father of Eugene Lobato and Emilio Lobato grazed cattle and sheep on land north of the defendant's land prior to 1960.

5. In each instant where the plaintiffs base their claim upon land owned by them and others the named plaintiffs have the authority to represent their co-tenant in this proceeding.

6. Bonnie Lobato and Corpus Gallegos are physically and mentally unable to represent themselves in this litigation and the Court hereby appoints Theresa Lobato to proceed on behalf of Bonnie Lobato, and Joseph Gallegos, a general partner in Corpus Gallegos Ranches, a limited partnership, to proceed on behalf of Corpus Gallegos.

7. Maps on file in the Assessor's Office of Costilla County designated grazing leases on the land of the defendant in the year 1913.

8. Some of the sheep owners in the community would check with ranch managers of the defendant predecessors in title for rights to graze sheep on the land now owned by the defendant.

9. The chain of title, without gaps, of all land now owned by the plaintiffs and the defendant extends from Carlos Beaubien in 1863.

10. Prior to 1960, the then existing ranch managers would direct plaintiffs and others to move flocks of sheep to specific locations. This was done without protest.

11. The 1900 Tax Deed to Keely was a sham to defeat the interest of bondholders.

12. The Beaubien Paper is a Spanish document executed by Carlos Beaubien, and recorded in Book 1 of the grantor-grantee index of Costilla County.

13. The "Jenkins" translation of the Beaubien Paper is a true and accurate translation from the Spanish language to the English language.

14. Prior to the execution of the Beaubien Paper in 1863, Carlos Beaubien executed a lease to the U.S. Government for the maintenance of Fort Garland, in which he granted to the lessee the right to pasture, cut grass, timber and collect firewood on land owned by him and his wife.

15. The Beaubien Paper is not an ambiguous paper on its face as it pertains to the land now owned by the defendant.

16. On April 4, 1864, the widow of Carlos Beaubien conveyed the remainder of the Beaubien property to William Gilpin without reservation of rights to anyone.

17. The warranty deed by which the defendant acquired title to his land stated "subject to claims of the local people to pasture, wood and timber of so-called settlement rights in, to and upon said land."

CONCLUSION

The Court will first address the issue of whether or not the plaintiffs have the right to assert an alternative theory of recovery.

As an alternative theory of recovery the plaintiffs contend that their rights were established under the law of prescription by continuous use by their predecessors in title, and the plaintiffs themselves. The Court denied the plaintiffs' attempt to file a Third Amended Complaint setting forth this theory for the following reasons:

1. The Motion to File Third Amended Complaint was filed with this Court on July 28, 1997, less than two months before trial.

2. The action was commenced in 1981.

3. Leave to file the Second Amended Complaint was granted on February 18, 1997.

4. The plaintiffs had 16 years to perform discovery and define the issues to be tried. To make drastic changes in the complaint by adding six new claims for relief at the 11th hour would necessitate a delay in the trial of this acrimonious, 17-year-old dispute and that would not best the interest of justice.

The Court, in an attempt to avoid prejudice to come to the plaintiffs because of the dilatory acts of their attorneys reserved ruling on the defendant's objection, and heard evidence of the alternate theory.

The Court now denies the plaintiffs right to present an alternative theory of use by prescription as being a matter not set forth in the Second Amended Complaint and therefore offered without notice to the defendant.

Even if the Court was to consider the evidence, and amend the pleadings to conform to the evidence, the theory of prescription still must fail. The use rights asserted by the plaintiffs are rights to take from the land part of the soil or produce, in other words profits a prendre. This differs from an easement in that a profit a prendre is an interest or an estate in land, whereas an easement is a privilege without profit.

The rule adopted by the majority of the states is that a profit a prendre must be expressly granted. Colorado has adopted this position. *Dawson, Inc. v. Fling,* 155 Colo. 599, 396 P.2d 599 (1964). A 1940 Minnesota case best described this theory in *Valley Gun Club v. Northling Corp.,* 207 Minn. 126, 29 N.W. 222, "since a profit a prendre is an interest in realty, it must be created, in contrast to a license, by properly executed writing." To hold otherwise would deprive the defendant of the benefits of ownership, and leave him with only the burden of paying taxes with no commensurate value. *Desert Livestock Co. v. Sharp,* 259 P.2d 607 (Utah 1953).

Again, even if the Court was to find that the plaintiffs' use rights were subject to creation by prescription (which it does not), the court must find from the evidence that the plaintiffs have failed to bear their burden of proof on the essential element of adversity. Colorado has long held that grazing of livestock or engaging in other activities on unfenced, open western lands is not sufficient to create continuing rights to engage in those activities. *Palmer Ranch Ltd.v. Sawasdi,* 920 P.2d 870 (Colo. App. 1966) (cert. denied). Other than the use of the defendant's land, there is no evidence that the use was exclusive, hostile or adverse to the interest of the defendant or his predecessors in title. Further, it is well settled that the public cannot acquire custom or common prescription profit a prendre in another's land. *Salazar v. Taylor,* 377 F.2d 733 (10th Cir. 1967).

The Court will now address the claim of Pete Espinoza, Jr.

In its order of October 8, 1997, the Court found that the defendant did not exercise due diligence in ascertaining the identity of this plaintiff, who had an identifiable interest. The Court erred, and the finding is incorrect.

The evidence is uncontroverted that this plaintiff was 12 years old at the time of the Taylor Torrens Action, that he acquired property in 1978 which was not previously titled in any of his ancestors, that in 1960 he was not the Sheriff of Costilla county nor was he a notorious person. The Court, therefore, corrects its order to find that this plaintiff was not a person with an identifiable interest whose identity could be reasonably ascertained.

The Court will not address the rights of Eugene Lobato and Emilio Lobato to continue the use of roads upon the defendant's land to maintain the headgates and ditches appurtenant to their adjudicated water rights.

Although this matter was not plead in the plaintiffs' Second Amended Complaint, in the interest of justice or

judicial economy the Court amends the Complaint to conform to the evidence. It is undisputed in Colorado that holders of adjudicated water rights have the right of access to maintain the necessary appurtenances to these rights by constitution, statutes and Colorado case law, Article 14 of the *Colorado Constitution, C.R.S.* 39-92-1(1), *et seq., Fearnley v. Haines*, 91 Colo. 41, 168 P.2d 1176, *Shrull v. Rapsardi*, 517 P.2d 862 (Colo.App. 1972).

Based upon the findings made by this Court and the state of the law in Colorado, it would be a judicial disgrace to require these plaintiffs to engage in additional litigation to establish what would be the obvious result.

The Court will next address the principal issue in this litigation: Does the Beaubien Paper factually or legally establish any rights of use that the plaintiffs claim to the Taylor Ranch? The Court adapts the principal that an instrument creating an interest in real property must identify the parties, the property and the property interest conveyed. The Beaubien Paper does not mention fishing, hunting or recreating, and as profits a prendre they must be expressed in writing to vest.

The Beaubien Paper is not ambiguous on its face as pertains to the Taylor Ranch. Nowhere does it describe, mention or infer that the conditions or rules set forth therein apply to any land except "land of the Rito Secco, Plazas of San Luis, San Pablo, San Bellejos, Lands from the other side of the Vega . . . that are not irrigated with the waters of the Gregorio Martin." The Rito of Jose Gregorio Martin is now known as Rito San Francisco. The evidence clearly established that none of these locations are situate on the land owned by the defendant.

None of the plaintiffs have, nor had their predecessors in title, ever claimed to have title to any portion of the Taylor Ranch, nor does any document in their chain of title ever make reference to the use rights claimed. The only reference

in any document of conveyance to any of the litigants is the "subject to" clause in the defendant's deed, and that does not refer to any right vested or unvested, but only that the plaintiffs claim to have a right. This claim is the subject matter of this litigation, as it has been in previous litigation.

The Court further considered that Carlos Beaubien knew how to convey use rights or profits a prendre, as exemplified in his lease to the U.S. Government for the maintenance of Fort Garland prior to execution of the Beaubien Paper.

The Court does not dispute Dr. Mary Ann Stoller's hypothesis, that the original settlers of the San Luis area could not survive as sheep ranchers without the use of the mountain area east of their home place, but to accept that as an intention of Carlos Beaubien to do something other than he did would be an academic theory rather than sound judicial reasoning. Therefore, the plaintiffs have not borne their burden of proof that Beaubien intended to do anything with the mountain tract, except keep it to himself for whatever reason. He was a developer, land seller and profiteer who received, from the U.S. Congress the land known as The Sangre de Cristo Grant comprising 1,000,000 acres, without any legal duty to encumber and portion thereof with use rights of any nature. He had the right to do with the land as he wished.

The Court believes that the Hon. Chas. C. Holbrook, as a sitting judge in Costilla County District Court in his order and decree in Civil Action No. 557, best described the Beaubien Paper, to wit:

> "I therefore conclude that the paper referred to is simply a writing of regulations, and was not intended as a conveyance, grant or donation of the Sangre de Cristo grant to the first settlers and their heirs and assigns, and it was never intended to conclude the right, power of Beaubien to sell, lease, or otherwise dispose of the unconveyed portions of the grant, excepting only

commons of the towns, the townsites, and donation for church purpose. . . ."

This Court agrees with Judge Holbrook that the Beaubien Paper is not a document of conveyance to any use rights on the land now owned by the defendant.

The last issue the Court will address is the defendant's claim that this action is groundless and frivolous. The defendant bases his claim on the fact that five judges have found the Beaubien Paper is not a document of conveyance, and therefore no use rights existed for the benefit of the plaintiffs.

This Court is not privy to the testimony of the several previous actions involving this matter, and therefore cannot determine that all matters presented to this Court have been presented in the other actions. Therefore the Court cannot find that the plaintiffs' claims are groundless and frivolous.

ORDER

1. The plaintiff Pete Espinoza, Jr., is dismissed from the action with prejudice.

2. The plaintiffs Eugene Lobato and Emilio Lobato have the right to travel upon the existing roads in the style and manner which they have in the past to maintain their headgates and ditches appurtenant to their adjudicated water rights that are situate on the land now owned by the defendant.

3. All other claims and causes of actions presented to the court by the plaintiffs be and are dismissed with prejudice, and the defendant be awarded his costs as provided by law.

Done and signed this 12th day of June, 1998.

BY THE COURT:

/s/ Gaspar F. Perricone
Judge

APPENDIX G

DISTRICT COURT FOR THE COUNTY OF COSTILLA
STATE OF COLORADO

[Filed Apr. 23, 1998]

Civil Action No. 81 CV 5

PETE ESPINOSA, JR., BONNIE LOBATO, EUGENE LOBATO, EMILIO LOBATO, JR., MICHAEL J. VIGIL, ADELINE ESPINOSA, NORMAN MAESTAS, EUGENE MARTINEZ and LUCILLE SAMELKO,

Plaintiffs,

And

CORPUS GALLEGOS and ZACK BERNAL,

Intervenors,

Vs.

ZACHARY TAYLOR, as Executor of the Estate of JACK T. TAYLOR, JR., Deceased, *et al*

ORDER GRANTING IN PART AND DENYING IN PART THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court has read and reviewed the Defendant's Motion, the Plaintiffs' Response thereto, the Defendant's Reply to the Response, together with all exhibits attached, in total in total [sic] more than 800 pages, now being fully advises in the premises dispenses with oral argument pursuant to rule and issues it's Order.

The first issue presented in the Defendant's Motion is that the Plaintiffs and Intervenors claims are time barred by the application of 38-36-131, 132, 190 CRS, 1963 and 38-41-111 CRS, 1964, and their precursors. The Court has previously

ruled that the remaining Plaintiffs and the Intervenors in this action were denied due process of law when they were not named or served with process in the 1960 Torrens Registration action. The Court now finds that there is no dispute as to material facts concerning this issue, and that the matter presents only a question of law.

The Court of Appeals in this action stated "In light of the Supreme Court's opinion we conclude that this is a situation in which the equitable tolling of the statute of limitation may be appropriate. However, we cannot conclusively make this determination as the Supreme Court made it clear that a factual dispute exists regarding the efforts defendant used to identify reasonable ascertainable persons with an identifiable interest in his property. Therefore we must remand to the trial court to make this factual determination." This has now been done, and this Court finds that the doctrine of equitable tolling is applicable to this case. To hold a contrary interpretation would render the Supreme Court's opinion in this case meaningless.

Therefore the Defendant's Motion for Summary Judgment on the issue that the Plaintiffs' claims are timed barred is hereby denied.

The second issue raised by the Defendant in his Motion is that the claims of the Plaintiff and the Intervenor are invalid as a matter of law under the doctrine of stare decisis. The Court finds that there is no dispute of material facts surrounding this issue. The property, subject to this action was transferred to the United States of America under the provisions to the Treaty of Guadalupe Hildago, and from the United States to Charles Beaubien. Pursuant to a Congressional act a Surveyor-General was appointed and he was charged with the duty to determine the nature of Mexican land grants of the Sangre de Cristo grant, of which the subject property was a part. The Surveyor-General concluded that the grant was a private one whose ownership was vested com-

pletely and exclusively in Charles Beaubien. His report to Congress recommended that the Sangre de Cristo grant be confirmed to Charles Beaubien. Congress acted upon recommendation for confirmation by the Surveyor-General. The confirmation was absolute and unconditional in Charles Beaubien.

The United States Supreme Court has consistently held that a Confirmatory Act of Congress is final and conclusive as to the nature and validity of a grant and is not subject to judicial review. *Tameling v. United States Freehold, Etc. Co.*, 93 U.S. 644, 23 L.Ed. 998, 1001 (1876); *Maxwell Land Grant Case*, 121 U.S. 325, 7 S.Ct. 1015; *Martinez v. Rivera,* 196 F.2d 192; *Flores v. Brusselbach*, 149 F.2d 616. Applying these principals of law to the facts of this case, or by applying the principals of the doctrine of stare decisis the Court can come to only one conclusion that any purported rights that might has existed, if any, were extinguished by the 1860 Confirmatory Act of Congress, and if the confirmation of the title was contrary to the treaty provisions, the question was political not judicial.

Therefore the Court Grants the Defendant's Motion for Summary Judgment of the issue that any claim which the Plaintiffs assert which arose prior to the Confirmatory Act of Congress is now extinguished.

The third issue raised by the Defendant in his Motion is that the Plaintiffs' complaint fails to state a claim because they do not seek the exclusive remedy available under the Colorado Torrens Title Registration Act. The Court finds that this is a matter of law, not of fact and is subject to determination before trial by motion for Summary Judgment.

This Court has ruled that the Defendant violated Plaintiffs' due process rights in the Torrens action. The Torrens Decree has been annulled, avoided and is of no effect as to those Plaintiffs whose due process rights were violated in that

action, and the Defendant cannot now rely upon the Torrens Act limits the Plaintiffs' claims.

The Court therefore denies Defendants Motion for Summary Judgment of the issue that the Plaintiffs failed to seek the exclusive remedy available under the Colorado Torrens Title Registration Act.

The Fourth issue raised in his Motion, the Defendant Contends that as a matter of law the 1863 Beaubien Paper created no rights to the Taylor ranch property. The Court finds that this issue is the crux of the litigation and that many matters of disputed material facts must be presented to the trier of fact. Among those factual determinations are: whether the Beaubien Paper reserved in the Plaintiffs the right to hunt, fish, recreate, gather fire wood, timber and graze livestock on the Taylor ranch, and if such right did exist, did it run with the land.

Therefore, the Court finds that Material issues of fact exist and the question is not a proper subject for a Motion for Summary Judgment.

The fifth issue raised in his Motion, the Defendant contends that any claim which the Plaintiffs assert are, at best, profits a prendre and are not appurtenant to their titles to any Costilla County property and those rights do not run with the land.

The Court has previously stated that this is a factual [determination] that the Court must determine at trial, and it is not a subject for a Motion for Summary Judgment.

The sixth issue to be raised in his Motion is that the Tax Deed issued in 1900 created virgin title to the subject property cutting off the claims of the Plaintiffs.

The Court find that the validity of the 1900 Tax Deed is a matter of fact, and not a proper subject of a Summary Judgment Motion.

The seventh and tenth issues raised in his Motion involve adjudication to the Salazar Estate lands. The Court finds that this issue is not properly before the Court, and no orders can be entered affecting the title to said lands. However, for the sake of judicial economy the Court will make factual findings on this issue that may aid to limit further litigation involving the subject matter now before the Court.

The eighth issue raised in his Motion, is that the Claims of Pete Espinoza Jr. are barred by the doctrine of res judicata. The Court finds that there is a genuine issue of material fact, i.e. to what property is this Plaintiff asserting a right, and were his predecessors in interest named or served in the Torrens action? Therefore this issue is not a proper subject for a Summary Judgment Motion.

The ninth issue raised in his Motion is that the Plaintiff Bonnie Lobato is barred by the doctrine of res judicata as to the mountain tract. The Court finds that it is undisputed that this Plaintiff was named, personally served and appeared by counsel in the Torrens action. Therefore grants the Motion for Summary Judgment, and dismisses Bonnie Lobato from this action.

The eleventh and last issue raised in his Motion is that the newly admitted Plaintiffs have not met the Court's requirement that they are reasonable ascertainable persons with identifiable interests. The Court finds that this is a factual determination to be decided at trial, and is not a proper subject for a Summary Judgment Motion.

Done and signed this 19th day of April, 1998

BY THE COURT

/s/ Gaspar F. Perricone
GASPAR F. PERRICONE, Judge

APPENDIX H

DISTRICT COURT, COUNTY OF COSTILLA
STATE OF COLORADO

[Filed Oct. 8, 1997]

Case No. 81 CV 5, Division A

APOLINAR RAEL, *et al.*,

Plaintiffs,

v.

ZACHARY TAYLOR, as Executor of the Estate of JACK T. TAYLOR, JR., Deceased, *et al.*,

Defendants.

ORDER

This proceeding is the result of the mandate of the Supreme Court of Colorado in Rael etc., et. al. vs. Taylor etc., 867 P2d 1210, wherein the Supreme Court directed the Court of Appeals to conduct further proceedings in conformity with it's opinion, and the Court of Appeals assigned this fact finding responsibility to the District Court of Costilla County.

The Supreme Court found that, as a matter of law, applicants for a decree to confirm and register property pursuant to the Torrens Act have a duty to exercise reasonable diligence in identifying all reasonable ascertainable persons who have an identifiable interest in the property, and are thus entitled to the named and personally served.

The Court further found that if the plaintiffs were reasonably ascertainable persons with an identifiable interest and were not named and personally served, they were denied due process and the Torrens decree entered by the United States District Court, referred to as the 1960 Torrens Action, is void as to them.

The plaintiffs are attacking the validity of the decree, and therefore bear the burden of proof that the decree is void as to them for the want of notice and a denial of due process.

The objective test laid down by the Supreme Court has two prongs. The first is: Do the plaintiffs have an identifiable interest in the property; and second is: If they do have an identifiable interest, can their identities be reasonably ascertained with the exercise of due diligence?

The testimony is undisputed that the appointed examiner in the 1960 Torrens Action, W.W. Post, reported to the United States District Judge that 269 names are names of persons whose only possible interest in the defendants property would be as landowners in Costilla County claiming rights to pasture and wood gathering solely because they are landowners.

The evidence is further undisputed that these claimed rights derive from the "Beaubien Document," recorded in Book 1, pages 245 and 256 of the real estate records of the Clerk and Recorder of Costilla County. It is further undisputed that the title examiner was told by one Amodeo Vigil that although there is no list of names, the persons making claims under the "Beaubien Document" are all the owners of property in Costilla County.

The Court finds that, although it does not identify claimants, the "Beaubien Document" provides the plaintiffs with such identifiable interest to satisfy the first prong of the objective test.

The plaintiffs' claim an interest in the defendant's property as landowners in Costilla County who were not named and not personally served in the 1960 Torrens action. They further claim that as owners of property in Costilla County, with due diligence, their identity was reasonably ascertainable in the records of the Assessor of the county by the defendant or his agents.

The defendant contends that due diligence does not demand of him to name and serve all owners of land in Costilla County, but that he exercised reasonable diligence to ascertain all parties who claim under the "Beaubien Document."

This Court heard testimony from three qualified real estate attorneys, as experts, Don Lesher, Frederick Skilleren and Willis Carpenter. After a careful review of Mr. Lesher's deposition, and the testimony of Mr. Skilleren and testimony and the written report of Mr. Carpenter, the Court finds that the testimony of Mr. Carpenter was the most credible. The Court finds he better understood the Remand of the Supreme Court, i.e. "Did the defendant, the applicant for a decree to confirm and register title to property pursuant to the Torrens Act, exercise reasonable diligence under all the circumstances to ascertain the names of persons who claimed an interest in the property?

He analyzed the provisions of the Torrens Act and the objective test set forth by the Supreme Court, and set forth three steps that a reasonable prudent applicant would take in the exercise of reasonable diligence under all circumstances then pertaining to ascertain the names of persons claiming an interest in his land, to wit;

1. Obtain a current abstract of title, prepared and certified by a person regularly engaged in the abstract business and meeting the other criteria set forth in CRS 38-36-116. The Abstract should cover all of the lands described in the applications. From such abstract a list would be prepared of the named of all persons or parties who appear of record to have any right, title, claim, estate, lien, encumbrance in the Mountain Tract.

2. Make an on-site inspection of the land to determine the name and post office address of each and every occupant thereof and describe the estate or interest such occupant has or claims in the land.

3. List the names of any persons, firms or corporations having or claiming any estate, interest, or claim in law or equity, in possession, remainder reversion, or expectancy, with their post office addresses and the nature of these estates or claims.

The Court further finds that under the Torrens Act, the only relevant public record to be searched and examined are the real estate records of the Clerk and Recorder. No other public record would disclose a claimed right of possession. Other public records may aid in the investigation and identification of property description or addresses of persons identified in the records of the Clerk and Recorder, or in possession, but not as an index of ascertainable persons.

The Court further finds that the plaintiffs are not identified as persons with an identifiable interest in the abstract of title or the records of the Clerk and Recorder of Costilla County.

The Court further finds that the 269 names of persons claiming under the "Beaubien Document" were ascertained by reasonable diligent inquire and inspection of the land.

The Court further finds that due diligent would not require the defendant to name and serve all owners of property in Costilla County, but only those whose names are reasonable ascertainable.

Applying the standards of due diligence, above set forth, to the facts of this case, the Court finds that plaintiffs Billy Alire, Jose Fred Carson, Ruben Gallegos, Solestiano Martinez, Raymnd N. Medina, Gertrude C. Olivas, James Sanchez, Jose G. Sanchez, Ronald A. Sandoval, and Sam Valdez have failed to produce any evidence to support their

burden of proof, and their claims are dismissed with prejudice. The Court further finds that Henry Lobato, Bert Maestas, Cruicito Maes, Daniel Martinez, Leonardo Martinez, and Henry Rodriguez have failed to produce any evidence to support their burden of proof, but they are deceased or have transferred their interest to heirs or successors, and motions for substitution have been filed in their behalf. The Court therefore, in the interest of justice, dismisses their claims without prejudice, and grants these named plaintiffs, successors in interest 30 days from the date of this order to properly petition the Court to be substituted as parties plaintiffs.

The Court finds that the plaintiffs Emilio Lobato and Michael Vigil were personally named and served in the 1960 Torrens action and they are thereby barred by the doctrine of res-judicata from pursuing any claim against the defendant's property that was the subject of the 1960 Torrens action.

The Court finds that the plaintiffs Gloria Gallegos, Rupert Gallegos, Raymond Garcia, Richard Garcia, Charlie Jacquez, Jr., Adolph J. Lobato, Bobbie Maestas, Raymond J. Maestas, Mark Martinez, Agatha Medina, Andres Montoya, Shirley Romero Otero, Eppy Quintana, Arnold Valdez, Martha Vialpando, Elvin L. Vigil and Larry J. Vigil were not property owners in 1960. There was insufficient evidence presented that circumstances existed in 1960 that these plaintiffs or their predecessors in interest, in the exercise of due diligence, would cause the defendant to ascertain their identities as persons claiming a right of possession in the defendant's land under the "Beaubien Document" or otherwise.

The Court finds there is no dispute that the Mountain Tract and the Salazar Estate was used for grazing, and in the exercise of due diligence the defendant had a duty to ascertain the identity of owners of property that ran cattle or sheep within a reasonable proximity to the defendant's land and name and personally serve such person. The evidence pre-

sented in this case, and the Court so finds, that Corpus Gallegos was a substantial landowner in 1960, that he grazed cattle and sheep on both the Mountain Tract and the Salazar Estate, that he was known to the defendant personally, and that at times ran cattle and sheep under a lease with the defendant.

Applying these facts to the standards of due diligence, set forth above, the Court finds the defendant failed to exercise due diligence in ascertaining the name of Corpus Gallegos as a person with an identifiable interest that should be named and personally served. Although Corpus Gallegos is not a named plaintiff, in the interest of judicial economy and justice, this party shall have 30 days from the date of this order to petition for intervention.

The Court finds that the plaintiff Eugene Lobato was an owner of property in 1960 that abutted the defendant's Mountain Tract, that he is a member of the farming and ranching family known to the defendant, that he could not access his entire land without going onto the Mountain Tract, that he owned rights to water that had it's point of diversion on the Mountain Tract, that although he was an absentee owner in 1960, his family farmed his land during his absence and grazed cattle on the Mountain Tract in 1960. This plaintiff was not named or personally served in the 1960 Torrens Action of the Salazar Quiet title action. The Court concludes that the defendant did not exercise due diligence in ascertaining this plaintiff's identity as a person with an identifiable interest.

The Court finds that the plaintiff Pete Espinoza purchased a substantial tract of land subsequent to 1960, that he was a notorious person in the community, that he was formerly Sheriff of Costilla County, that his family was engaged in cattle and sheep grazing on the Mountain Tract, that this plaintiff or his predecessor in interest were not named and personally served in the 1960 Torrens Action or the Salazar

Quiet title action. From these findings the Court concludes that the defendants did not exercise due diligence to ascertain this plaintiff's identity as a person with an identifiable interest.

The Court finds that the plaintiff Zack Bernal was an owner of property in 1960, that at that time he owned cattle. The Court concludes that the defendant did not exercise due diligence to ascertain this plaintiff's identity as a person with an identifiable interest.

The Court finds that the plaintiff Boni Lobato is a life long resident of the area, that he and his family is and were engaged in ranching and grazing of cattle and sheep, that he acquired his land in 1971, that he or his predecessor in interest were not named or served in the 1960 Torrens Action or the Salazar Quiet title action. From these findings the Court concludes that the defendant did not exercise due diligence to ascertain this plaintiff's identity as a person with an identifiable interest.

The Court has previously found that the plaintiff Emilio Lobato is barred by the doctrine of res-judicata as to the Mountain Tract. However, the Court finds that this plaintiff was not named or personally served in the Salazar Quiet title action, that he was not an owner of property in 1960, but acquired his property in 1963 before the Salazar Quiet title action, that he was a member of a ranching family in the area, and as such was named and personally served as an ascertainable person with an identifiable interest in the Torrens action. The Court further finds that at the time of the Salazar Quiet title action, this plaintiff was engaged in cattle ranching activities in the area. From these findings the Court concludes that if this plaintiff was an ascertainable person with an identifiable interest in the Mountain Tract, he certainly was such a person in the Salazar quiet title action and due diligence was not exercised by the defendant in ascertaining the identity of this plaintiff.

Although the Court does not find that the Salazar quiet title action was part of the Supreme Court mandate, it was an issue presented to the Court and not addressed. Therefore, for the purpose of judicial economy makes finding of fact only without orders.

The Court further concludes that since this Court has found that each person claiming under the "Beaubien Document" has an identifiable interest, and that due diligence did not require the defendant to name and serve all owners of property in Costilla County, but only those whose names are reasonably ascertainable, a finding of due diligence is required for each claimant under the particular circumstances surrounding the ascertainment of that claimant. The evidence presented in this proceeding indicated that the circumstances of each claimant's identity are unique and not subject to determination by class.

Based upon the findings and conclusions above set forth, the Court orders:

1. The claims of Billy Alire, Jose Fred Carson, Ruben Gallegos, Solestiano Martinez, Raymond N. Medina, Gertrude E. Olivas, James Sanchez, Jose G. Sanchez, Ronald A. Sandoval, Sam Valdez, Gloria Gallegos, Rupert Gallegos, Raymond Garcia, Richard Garcia, Charlie Jaquez, Jr., Adolph J. Lobato, Bobbie Maestas, Raymond C. Maestas, Mark Martinez, Agatha Medina, Andres Montoya, Shirley Romero Otero, Eppy Montoya, Arnold Valdez, Martha Viapando, Edwin L. Vigil, and Larry J. Vigil are dismissed with prejudice.

2. The claims of Henry Lobato, Bert Maestas, Cruicito Maes, Daniel Martinez, Leonardo Martinez, Henry Rodriguez be dismissed with prejudice.

3. The claims of Emilio Lobato and Michael J. Vigil be dismissed with prejudice as to the lands of the Mountain Tract only.

4. The claims of Pete Espinoza, Bonnie Lovato, Eugene Lobato and Zack Bernal are not dismissed and remain for future Court adjudication.

5. The Motion for class action certification is denied.

6. The Court's Orders are pursuant to the mandate of the Supreme Court and are made to posture the matter for trial on the merits. They are not final judgments for appeal purposes.

Done and signed in open Court this 8th day of October, 1997.

By the Court

/s/ Gaspar F. Perricone
GASPAR F. PERRICONE
Senior Judge

APPENDIX I

DISTRICT COURT, COSTILLA COUNTY
STATE OF COLORADO

[Filed Sep. 26, 1986]

Case Number 81CV5

APOLINAR RAEL, *et al.*,
Plaintiffs,

vs.

JACK T. TAYLOR, JR., *et al.*,
Defendants.

JUDGMENT FOR DEFENDANT ON MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

Jack T. Taylor has fee simple title to the property known as the Taylor Ranch composed of nearly 80,000 acres. There are no roads or easements across or upon the property for the benefit of the public or these Plaintiffs.

Taylor bought the "Mountain Tract" in 1960 and the "Salazar Tract" in 1973. Both tracts are in Costilla County. At all times since his purchases he has occupied all the land. Fencing of the land and barricading of roads began in 1963 and has continued since that time.

In 1960 Taylor began a "Torrens" title action in the U.S. District Court, (Colorado). The action covered only the "Mountain Tract". Final judgement entered in the trial Court on October 5, 1965. The judgement quieted title in Taylor free and clear of any and all liens, encumbrances, interests, claims and estates of all persons known or unknown. On

May 17, 1967 the U.S. Court of Appeals for the Tenth Circuit affirmed the trial Court and rehearing was denied June 23, 1967. There was no further appeal.

A Mr. Platt was appointed title examiner to verify the "Torrens" petition and determine who should be parties. The Plaintiffs actually named 239 Defendants when the case was filed. The Court, on March 5, 1962, ordered another 133 persons named as Defendants, making a total of 472. Unknown persons claiming original interest were designated. All named Defendants were land owners in Costilla County. Mr. Platt found 47 persons named in the chain of title and they were all named Defendants. He finally concluded that claims for the right to graze, timber, hunt and fish made by the Defendants were made on behalf of all landowners in Costilla County. There was no attempt by Plaintiffs to name or serve all landowners except to comply with the Court order of March 5, 1962 which required the naming of 133 additional Defendants. There were many landowners who were not named parties.

The Plaintiffs in this case were not named as Defendants in the "Torrens" action. The Defendants in the "Torrens" action did not contend that they or predecessors appeared in the "Mountain Tract" chain of title nor did they claim possession of any of the "Mountain Tract" at any time. In the present case the Plaintiffs do not claim that they or their predecessors appear in the "Mountain Tract" chain of title nor do they contend that they or their predecessors have ever been in possession.

In the "Torrens" action Mr. Sam Taylor, and Mr. Eliu, attorneys, entered an appearance for all Defendants. The appearances were never officially withdrawn. Alfred Craddock attorney entered an appearance for some Defendants not previously named. Craddock presented to the trial Court issues questioning who Taylor and Romero represented and the quality of representation given by them. Thereafter,

attorney Eugene Tepley represented the Defendants. Four different lawyers appeared for Defendants or some of them in that case.

In 1960 this Court entered a decree quieting title to the "Salazar Tract" in Taylor's predecessors in title. The named Defendants were almost the same as in the "Torrens" action in the Federal Court. Unknown parties were so designated. The named Defendants were represented by attorney Rafael J. Moses. There was no appeal in this case. None of the Defendants were in possession nor did they appear in the chain of title.

The claims of the Defendants in the "Torrens" title case and the "Salazar Tract" quiet title were the same as the claims asserted by Plaintiffs in this case. In each action the persons claiming against Taylor or his predecessors claimed the right to graze the land, the right to remove building timber and firewood, the right to fish and hunt and the right to recreation upon the ground. These claims are made on behalf of all the heirs and successors in interest to the original settlers on the "Sangre de Cristo" land grant. In each case the rights asserted are usufructory rights and are claimed in common for all landowners in Costilla County. The "Salazar Tract" was and is part of the Taylor Ranch described in this action. Again Plaintiffs are faced with the same persons or those under whom they claim covering the same land and involving the same claimed rights to graze, timber, and etc.

In the U.S. District Court for Colorado, Jack T. Taylor, Jr. established by decree that there are no roads or rights of way traversing or entering upon the "Taylor" Ranch. Jack T. Taylor, Jr. vs Ernest Sandoval, Civil Action Number 74-C-734.

Jack T. Taylor Jr., holds record fee simple title to the Taylor Ranch and has paid all taxes thereon since his acquisition of ownership. There is no dispute as to these matters.

Plaintiffs here further attempt to overcome the "Torrens" action and the quiet title action involving the "Salazar Tract" on the ground that there is newly discovered evidence. Counsel submits the Manuscript of Marianne L. Stoller in support of that position. However, the Manuscript does not present anything that was not available at the time the "Torrens" and "Salazar" tract actions were tried. Further, the proper method for raising a newly discovered evidence question is to go back into the original action under the procedural rules. Collateral attack on such a ground is not sufficient. Also, when the manuscript is carefully examined it is simply a statement that in the opinion of its author, the judges were mistaken in rendering the decisions they reached.

This action is barred by the provisions of the limitations statutes covering title and recovery of real estate, including but not limited to the "Torrens" statute.

The parties, or those under whom they claim, are the same. The land is the same as are the issues. There was opportunity for proper representation and litigation. The Federal judgement is not void. There was no duty to name every landowner in Costillo County.

In this case it is contended that the Plaintiffs or their predecessors have used the lands of Defendant Taylor for wood, grazing and etc., for many years and up to the present time. This exact same question was before the Federal Court in Taylor vs Jaquez et al. In addressing and deciding that matter the Federal Court said:

> "It may be inferred from the admitted facts in this case that from the time of earliest settlement, settlers on the grant were accustomed to and did use unfenced and uncultivated portions of the grant for pasture, for wood and timber, and for recreation, and that such use included the lands now owned by the Plaintiffs. This use has continued to the present time as to Plaintiffs lands.

> The Court concludes that such usage in common by inhabitants of an area does not vest in the general public or in the inhabitants of an area in common the rights here claimed."

On appeal from the federal decision the Court of Appeals, Sanchez vs J. T. Taylor, Jr., 377 Fed 2nd 733, concluded that under the same facts which are reasserted in this case there could be no rights acquired by prescription or adverse possession. Quoting further from the federal appeal, the Court stated:

> "We agree with the trial Court that such usage in common by the inhabitants of the area did not vest in them or the general public such rights as are claimed. It is settled that the public cannot acquire by custom or common prescription profits a pendre in another's land."

The usage in the federal case was the same as the usage here asserted.

The federal Court in the "Torrens" action specifically considered the contention that certain rights in Plaintiffs predecessors arose and existed in perpituity under Spanish law, Mexican law and by grant and dedication under the Treaty of Guadalupe Hildago. Each contention was resolved against the predecessors of these Plaintiffs.

For the purposes of this ruling the Court has assumed that all the facts set out by Plaintiffs are true. However, there are no disputed facts that could make any difference to the outcome of the present case. Plaintiffs 92 page brief and the oral argument made in opposition to the motion for summary judgment both fail to point out any significant factual dispute.

Defendant has requested an award in his favor for his attorney fees on the ground that this action is frivolous and groundless when viewed in connection with the previous litigation over the Taylor Ranch.

The Court does not find this action to be groundless or frivolous. Judgement in favor of Defendant prior to trial does not in and of itself support an award of attorney fees. There is legal authority in support of some of the issues asserted by Plaintiffs. The opinion of this Court disagreeing with such authority does not render the action frivolous or groundless.

It is the order of the Court that judgement enter herein in favor of Defendant on his motion for summary judgement or for judgement on the pleadings.

Done this 22nd day of September, 1986.

/s/ Max C. Wilson
MAX C. WILSON, Senior Judge

APPENDIX J

SUPREME COURT OF COLORADO
STATE JUDICIAL BUIDING
2 EAST 14TH AVENUE
DENVER, COLORADO 80203
(303) 861-1111

[Filed Jun. 18, 2003]

MAC V. DANFORD
CLERK OF COURT
COURT ADMINISTRATOR

June 16, 2003

Case No. 00SC527

RE: *Lobato v. Taylor*

The opinion in the above referenced case has been modified, and, as modified, the Petition for Rehearing is denied.

Enclosed are copies of the pages showing the changes marked, along with a clean version of the entire opinion that was announced on April 28, 2003.

Thank you.

MAC V. DANFORD
Clerk of the Supreme Court

/s/ [Illegible] (Seal)
Deputy Clerk

APPENDIX K

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT WITH THE REPUBLIC OF MEXICO

* * * *

Article VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

* * * *

In faith whereof, we, the respective plenipotentiaries, have signed this treaty of peace, friendship, limits, and settlement; and have hereunto affixed our seals respectively. Done in

quintuplicate, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord one thousand eight hundred and fifty-eight.

N. P. TRIST,	[L. S.]
LUIS G. CUEVAS,	[L. S.]
BERNARDO COUTO,	[L. S.]
MIGL. ATRISTAIN,	[L. S.]

APPENDIX L

FEDERAL STATUTES

CHAP. XLI.—*An Act to ascertain and settle the private Land Claims in the State of California.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted*, That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted*, That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted*, That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and

to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted*, That the said commissioners shall hold their sessions at such times and places as the President of the Unites States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted*, That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted*, That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted*, That each and every person claiming lands in California by virtue of any right or

title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted*, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimants or his attorney; and the party upon

whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted*, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted*, That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted*, That to entitle either party to a review of the proceedings and decision of the

commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted*, That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always*, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall

be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further*, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

Sec. 14. *And be it further enacted*, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or, village.

SEC. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or

Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted*, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted*, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted*, That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

APPROVED, March 3, 1851.

CHAP. CIII.—*An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor-General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor-General of Oregon; he shall have proper allowances for clerk hire, office rent, and fuel, not exceeding what now is or hereafter may be allowed by law to the said Surveyor-General of Oregon; and he shall locate his office from time to time at such places as may be directed by the President of the United States.

SEC. 2. *And be it further enacted*, That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years, who has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter-section, or one hundred and sixty acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however*, That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three

months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

SEC. 3. *And be it further enacted*, That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor-general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if approved by the Secretary of the Interior, a patent shall issue thereon: *Provided, however*, That on the death of any such settler before the completion of the four years' occupancy and cultivation required by this act, the right shall descend to his heirs at law, who shall be entitled to a certificate and patent, as aforesaid, on proof, as before provided, of continued occupancy and cultivation by such settler to the time of his death: *Provided, however*, That when lands are claimed under any of the provisions of this act by persons who are not citizens of the United States, patents shall not issue therefor until they become citizens.

SEC. 4. *And be it further enacted*, That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture, and all legal subdivisions settled on and occupied, in whole or in part, for purposes of trade and commerce, and not for agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold.

SEC. 5. *And be it further enacted*, That when the lands in the said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same.

SEC. 6. *And be it further enacted*, That, when the lands in said Territory shall be surveyed as aforesaid, a quantity of land equal to two townships shall be, and the same is hereby, reserved for the establishment of a University in said Territory, and in the State hereafter to be created out of the same, to be selected, under the direction of the legislature, in legal subdivisions of not less than one half-section.

SEC. 7. *And be it further enacted*, That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preëmption Act of fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

SEC. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the

premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

SEC. 9. *And be it further enacted*, That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act.

SEC. 10. *And be it further enacted*, That the President of the United States shall be and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office rent, fuel, incidental expenses, and clerk

hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

SEC. 11. *And be it further enacted*, That said Surveyor-General shall cause the necessary surveys to be made in said Territories of standard meridian, base, and parallel lines, and of township and subdivisional lines, under such rules and regulations as shall be prescribed by the Commissioner of the General Land-Office.

SEC. 12. *And be it further enacted*, That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preëmption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned; *Provided, however*, That where unsurveyed lands are claimed by preëmption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such lands shall forfeit all right thereto: *Provided*, said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

SEC. 13. *And be it further enacted*, That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the President may deem expedient; and he is hereby authorized to appoint, by and with the advice and consent of the Senate, a Register and

Receiver of Public Moneys for each of said districts, who shall each be required to reside at the site of their respective offices, and they shall have the same powers, perform the same duties, and be entitled to the same compensation as are or may be prescribed by law in relation to other land-offices of the United States. And the President is hereby authorized to cause the surveyed lands to be exposed for sale from time to time, in the same manner and upon the same terms and conditions as the other public lands of the United States.

APPROVED, July 22, 1854.

CHAP. CLXVII. *An Act to confirm certain Private Land Claims in the Territory of New Mexico.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor-general as number sixteen, be, and they are hereby, confirmed: *Provided,* That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

SEC. 2. *And be it further enacted*, That in surveying the claim of said John Scolly it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by

him; and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two square tracts, each of square form, in any part of the trac. claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section.

SEC. 3. *And be it further enacted*, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

SEC. 4. *And be it further enacted*, That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

SEC. 5. *And be if further enacted*, That it shall or may be lawful for the said Juan B. Vigil or any person claiming title under him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not confirmed under the provisions of the third section of this act; said suit to be instituted in the supreme court of the Territory of New Mexico, to be defended by the district-

attorney of the United States for said Territory, under the direction of the Attorney-General of the United States, with the right of appeal to either party from the decision of said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said supreme court of the Territory of New Mexico, and not thereafter: *Provided*, That if the suit authorized by this section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: *And provided further*, That in the determination of the suit authorized to be instituted by the terms of this section, the court shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however,* That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

APPROVED, June 21, 1860.

APPENDIX M

STATE STATUTES

Colo. Rev. Stat. § 38-36-101. Application to register title—by whom made.

The owner of any estate or interest in land, whether legal or equitable, except unpatented land, may apply as provided in this article to have the title of said land registered. The application may be made by the applicant personally, or by an agent thereunto lawfully authorized in writing, which authority shall be executed and acknowledged in the same manner and form as is now required as to a deed, and shall be recorded in the office of the county clerk and recorder in the county in which the land, or the major portion thereof, is situated before the making of the application by such agent. A corporation may apply by its authorized agent, and an infant or any other person under disability by his legal guardian. Joint tenants and tenants in common shall join in the application. The person in whose behalf the application is made shall be named as applicant.

Source: L. 03: p. 311, § 1. R.S. 08: § 714. C.L. § 4924. CSA: C. 40, § 169. CRS 53: § 118-10-1. C.R.S. 1963: § 118-10-1.

Colo. Rev. Stat. § 38-36-104. Contents of application.

(1) The application shall be in writing and shall be signed and verified by the oath of the applicant or the person acting in his behalf. It shall set forth substantially:

(a) The name and place of residence of the applicant, and if the application is by one acting in behalf of another, the name and place of residence and capacity of the person so acting;

(b) Whether the applicant (except in the case of a corporation) is married or not, and if married, the name and residence of the husband or wife, and the age of the applicant;

(c) The description of the land and the valuation for assessment thereof, exclusive of improvements, according to the

last official assessment, the same to be taken as a basis for the payments required under sections 38-36-186 and 38-36-198 (1) (a);

(d) The applicant's estate or interest in the same, and whether the same is subject to homestead exemption;

(e) The names of all persons or parties who appear of record to have any title, claim, estate, lien, or interest in the lands described in the application for registration;

(f) Whether the land is occupied or unoccupied, and if occupied by any other person than the applicant, the name and post-office address of each occupant and what estate or interest he has or claims in the land;

(g) Whether the land is subject to any lien or encumbrance, and, if any, the nature and amount of the same, and if recorded, the book and page of record, and the name and post-office address of each holder thereof;

(h) Whether any other person has any estate or claims any interest in the land, in law or equity, in possession, remainder, reversion, or expectancy, and, if any, the name and post-office address of every such person and the nature of his estate or claim;

(i) In case it is desired to settle or establish boundary lines, the names and post-office addresses of all the owners of the adjoining lands that may be affected thereby, so far as the applicant is able upon diligent inquiry to ascertain the same;

(j) If the application is on behalf of a minor, the age of such minor shall be stated;

(k) When the place of residence of any person whose residence is required to be given is unknown, it may be so stated if the applicant also states that upon diligent inquiry he has been unable to ascertain the same.

Source: L. 03: p. 312, § 4. R.S. 08: § 717. C.L. § 4927. CSA: C. 40, § 172. CRS 53: § 118-10-4. C.R.S. 1963: § 118-10-4.

Colo. Rev. Stat. § 38-36-108. Application made to district court—powers of court.

The application for registration shall be made to the district court of the county wherein the land is situated. Said court has power to inquire into the condition of the title to and any interest in the land, and any lien or encumbrance thereon, and to make all orders, judgments, and decrees as may be necessary to determine, establish, and declare the title or interest, legal or equitable, as against all persons, known or unknown, and all liens and encumbrances existing thereon, whether by law, contract, judgment, mortgage, trust deed, or otherwise, and to declare the order, priority, and preference as between the same, and to remove all clouds from the title, and for that purpose the said court shall always be open.

Source: L. 03: p. 316, § 8. R.S. 08: § 721. C.L. § 4931. CSA: C. 40, § 176. CRS 53: § 118-10-8. C.R.S. 1963: § 118-10-8.

Colo. Rev. Stat. § 38-36-113. Examiner of titles—compensation—oath—bond.

The judges of the district court in and for the judicial districts for which they are elected or appointed shall appoint a competent attorney in each county within their district as examiner of titles and legal adviser of the registrar. The examiner of titles in each county shall be paid in each case by the applicant such compensation as the judge of the district court determines. Every examiner of titles shall, before entering upon the duties of his office, take and subscribe an oath of office to faithfully and impartially perform the duties of his office, and shall also give a bond in such amount and with such sureties as shall be approved by the judge of the district court, payable in like manner and with like conditions as required of the registrar. A copy of the bond shall be

entered upon the records of said court and the original shall be filed with the registrar.

Source: L. 03: p. 317, § 13. R.S. 08: § 726. C.L. § 4936. CSA: C. 40, § 181. CRS 53: § 118-10-13. C.R.S. 1963: § 118-10-13.

Colo. Rev. Stat. § 38-36-114. Nonresident applicant to appoint process agent.

If the applicant is not a resident of the state of Colorado, he shall file with his application a paper, duly acknowledged, appointing an agent residing in this state, giving his name in full and his post-office address, and shall therein agree that the service of any legal process in proceedings under or growing out of the application shall be of the same legal effect when made on said agent as if made on the applicant within this state. If the agent so appointed dies or removes from the state, the applicant shall at once make another appointment in like manner, and if he fails to do so, the court may dismiss the application.

Source: L. 03: p. 318, § 14. R.S. 08: § 727. C.L. § 4937. CSA: C. 40, § 182. CRS 53: § 118-10-14. C.R.S. 1963: § 118-10-14.

Colo. Rev. Stat. § 38-36-115. Filing and service of application—land registration docket.

The application shall be filed in the office of the clerk of the court to which the application is made, and in case of personal service a true copy thereof shall be served with the summons, and the clerk shall docket the case in a book to be kept for that purpose, which shall be known as the "land registration docket". The record entry of the application shall be entitled (name of applicant), plaintiff, against (here insert names of all persons named in the application as being in possession of the premises, or as having any lien, encumbrance, right, title, or interest in the land, and the

names of all persons found by the report of the examiner provided for in section 38-36-118 to be in possession or to have any lien, encumbrance, right, title, or interest in the land), also all other persons or parties unknown, claiming any right, title, estate, lien, or interests in the real estate described in the application as defendants. All orders, judgments, and decrees of the court in the case shall be appropriately entered in such docket. All final orders or decrees shall be recorded, and proper reference made thereto in such docket.

Source: L. 03: p. 318, § 15. R.S. 08: § 728. C.L. § 4938. CSA: C. 40, § 183. CRS 53: § 118-10-15. C.R.S. 1963: § 118-10-15.

Colo. Rev. Stat. § 38-36-116. Abstract of title filed with application.

The applicant shall also file with the clerk, at the time the application is made, an abstract of title such as is now commonly used, prepared, and certified to by the county clerk and recorder of the county, or by a person, firm, or corporation regularly engaged in the abstract business, having satisfied the district court that they have a complete set of abstract books and are in existence and doing business at the time of the filing of the application under this article.

Source: L. 03: p. 318, § 15a. R.S. 08: § 729. C.L. § 4939. CSA: C. 40, § 184. CRS 53: § 118-10-16. C.R.S. 1963: § 118-10-16.

Colo. Rev. Stat. § 38-36-117. Copy of application filed with county clerk and recorder—lis pendens.

At the time of the filing of the application in the office of the clerk of the court, a copy thereof, certified by the clerk, shall be filed, but need not be recorded, in the office of the county

clerk and recorder and shall have the force and effect of a lis pendens.

Source: L. 03: p. 319, § 16. R.S. 08: § 730. C.L. § 4940. CSA: C. 40, § 185. CRS 53: § 118-10-17. C.R.S. 1963: § 118-10-17.

Colo. Rev. Stat. § 38-36-118. Examination of application and abstract—report of examiner.

Immediately after the filing of the abstract of title, the court shall enter an order referring the application to an examiner of titles, who shall proceed to examine into the title and into the truth of the matters set forth in the application, and particularly whether the land is occupied, the nature of the occupation if occupied, and by what right, and, also as to all judgments against the applicant or those through whom he claims title, which may be a lien upon the lands described in the application. He shall search the records and investigate all the facts brought to his notice, and file in the case a report thereon, including a certificate of his opinion upon the title. The clerk of the court shall thereupon give notice to the applicant of the filing of such report. If the opinion of the examiner is adverse to the applicant, he shall be allowed by the court a reasonable time in which to elect to proceed further, or to withdraw his application. The election shall be made in writing and filed with the clerk of the court.

Source: L. 03: p. 319, § 17. R.S. 08: § 731. C.L. § 4941. CSA: C. 40, § 186. CRS 53: § 118-10-18. C.R.S. 1963: § 118-10-18.

Colo. Rev. Stat. § 38-36-119. Issuance of summons.

If, in the opinion of the examiner, the applicant has a title as alleged, and proper registration, or if the applicant, after an adverse opinion of the examiner, elects to proceed further, the clerk of the court shall immediately upon the filing of the examiner's opinion or the applicant's election, as the case

may be, issue a summons substantially in the form provided for in section 38-36-123. The summons shall be issued by the order of the court and attested by the clerk of the court.

Source: L. 03: p. 319, § 18. R.S. 08: § 732. C.L. § 4942. CSA: C. 40, § 187. CRS 53: § 118-10-19. C.R.S. 1963: § 118-10-19.

Colo. Rev. Stat. § 38-36-120. Parties plaintiff and defendant—unknown claimants.

The applicant shall be known in the summons as the plaintiff. All persons named in the application or found by the report of the examiner as being in possession of the premises or as having of record any lien, encumbrance, right, title, or interest in the land, and all other persons designated as follows: "All other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein", shall be defendants.

Source: L. 03: p. 320, § 19. R.S. 08: § 733. C.L. § 4943. CSA: C. 40, § 188. CRS 53: § 118-10-20. C.R.S. 1963: § 118-10-20.

Colo. Rev. Stat. § 38-36-121. Contents of summons—service.

The summons shall be directed to the defendants and require them to appear and answer the application within twenty days after the service of the summons, exclusive of the day of service. The summons shall be served as is provided for the service of summons in civil actions in the district court in this state, except as otherwise provided in this article. The summons shall be served upon nonresident defendants and upon "all such unknown persons or parties", defendant, by publishing said summons in a newspaper of general circulation printed and published in the county where the application is filed, once in each week for three consecutive weeks, and such service by publication shall be deemed

complete at the end of the twenty-first day from and including the first publication. If any named defendant assents in writing to the registration as prayed for, which assent shall be endorsed upon the application or filed therewith and be duly witnessed and acknowledged, then in all such cases no service of summons upon said defendant shall be necessary.

Source: L. 03: p. 320, § 20. R.S. 08: § 734. C.L. § 4944. CSA: C. 40, § 189. CRS 53: § 118-10-21. C.R.S. 1963: § 118-10-21.

Colo. Rev. Stat. § 38-36-122. Clerk to mail copy of summons and other notices.

The clerk of the court shall also, on or before twenty days after the first publication, send a copy thereof by mail to such defendants who are not residents of the state whose place of address is known or stated in the application and whose appearance is not entered and who are not in person served with the summons. The certificate of the clerk that he has sent such notice in pursuance of this section shall be conclusive evidence thereof. Other or further notice of the application for registration may be given in such manner and to such persons as the court or any judge thereof may direct. The summons shall be served at the expense of the applicant, and proof of the service thereof shall be made as proof of service is now made in other civil actions.

Source: L. 03: p. 320, § 20a. R.S. 08: § 735. C.L. § 4945. CSA: C. 40, § 190. CRS 53: § 118-10-22. C.R.S. 1963: § 118-10-22.

Colo. Rev. Stat. § 38-36-123. Form of summons.

The summons provided for in section 38-36-121 shall be in substance in the following form:

SUMMONS ON APPLICATION FOR REGISTRATION OF LAND.

STATE OF COLORADO)
) ss.
County of .....)

In the District Court.

(Name of applicant), plaintiff .... versus .... (names of all defendants, and all other persons or parties unknown, claiming any right, title, estate, lien, or interest in the real estate described in the application herein) .....defendants.

The People of the State of Colorado to the above-named defendants, Greetings:

You are hereby summoned and required to answer the application of the applicant plaintiff in the above entitled application for registration of the following land situate in .....county, Colorado, to wit: (description of land), and to file your answer to the said application in the office of the clerk of said court, in said county, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said application within the time aforesaid, the applicant plaintiff in this action will apply to the court for the relief demanded in the application.

Witness .... clerk of said court and the seal thereof, at .... in said county, and state, this day of A.D. 20.... .

(Seal.) ..... Clerk.

Source: L. 03: p. 321, § 20b. R.S. 08: § 736. C.L. § 4946. CSA: C. 40, § 191. CRS 53: § 118-10-23. C.R.S. 1963: § 118-10-23.

Colo. Rev. Stat. § 38-36-130. Decree of confirmation—effect—appeal.

If the court, after hearing, finds that the applicant has title, whether as stated in his application or otherwise, proper for registration, a decree of confirmation of title and registration shall be entered. Every decree of registration shall bind the land and quiet the title thereto, except as otherwise provided in this article, and shall be forever binding and conclusive upon all persons, whether mentioned by name in the application or included in "all other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein", and such decree shall not be opened by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees, except as especially provided in section 38-36131. An appeal may be taken as provided by law and the Colorado appellate rules within the same time and upon like notice, terms, and conditions as are provided for the taking of appeals from the district court to the appellate court in civil actions.

Source: L. 03: p. 323, § 27. R.S. 08: § 743. C.L. § 4953. CSA: C. 40, § 198. CRS 53: § 118-10-30. C.R.S. 1963: § 118-10-30.

Colo. Rev. Stat. § 38-36-131. When decree may be opened.

(1) Any person having an interest in or lien upon the land who has not been actually served with process or notified of the filing of the application or the pendency thereof may at any time within ninety days after the entry of such decree, and not afterwards, appear and file his sworn answer to such application in like manner as prescribed in section 38-36-125 for making answer if such person had no actual notice or information of the filing of such application or the pendency

of the proceeding during the pendency thereof, or until within three months of the time of the filing of such answer, which facts shall be made to appear before answering by the affidavit of the person answering or the affidavit of someone in his behalf having knowledge of the facts; and also if no innocent purchaser for value has acquired an interest. If there is any such purchaser, the decree of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal provided for in section 38-36-130.

(2) Any person aggrieved by such decree in any case may pursue his remedy by suit in the nature of an action of tort against the applicant or any other person for fraud in procuring the decree and may also bring his action for indemnity as provided for in section 38-36-187.

(3) Upon the filing of such answer, and not less than ten days' notice having been given to the applicant and to such other interested parties as the court may order in such manner as directed by the court, the court shall proceed to review the case, and if the court is satisfied that the order or decree ought to be opened, an order shall be entered to that effect, and the court shall proceed to review the proceedings and shall make such order in the case as is equitable in the premises. An appeal may be allowed in this case, as well as from all other decrees affecting any registered title, within a like time and in a like manner as in the case of an original decree under this article, and not otherwise.

Source: L. 03: p. 324, § 28. R.S. 08: § 744. C.L. § 4954. CSA: C. 40, § 199. CRS 53: § 118-10-31. C.R.S. 1963: § 118-10-31.

Colo. Rev. Stat. § 38-36-132. Action to recover land—limitation.

No person shall commence any proceeding for the recovery of lands or any interest, right, lien, or demand therein or upon the same adverse to the title or interest as found or decreed in the decree of registration unless within ninety days after the entry of the order or decree. This section shall be construed as giving such right of action to such person only as shall not, because of some irregularity, insufficiency, or for some other cause, be bound and concluded by such order or decree.

Source: L. 03: p. 324, § 29. R.S. 08: § 745. C.L. § 4955. CSA: C. 40, § 200. CRS 53: § 118-10-32. C.R.S. 1963: § 118-10-32.

Colo. Rev. Stat. § 38-36-133. Certificate of title insures freedom from encumbrance—exceptions.

(1) Every person receiving a certificate of title in pursuance of a decree of registration and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith shall hold the same free from all encumbrances, except only such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and except any of the following rights or encumbrances subsisting, namely:

(a) Any existing lease for a period not exceeding three years, when there is actual occupation of the premises under the lease;

(b) All public highways embraced in the description of the land included in the certificates shall be deemed to be excluded from the certificate, and any subsisting right-of-way or other easement for ditches or water rights upon, over, or in respect to the land;

(c) Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title;

(d) Such right of appeal, or right to appear and contest the application, as is allowed by this article;

(e) Liens, claims, or rights, if any, arising or existing under the constitution or laws of the United States, and which the statutes of this state cannot or do not require to appear of record in the office of the county clerk and recorder.

Source: L. 03: p. 325, § 30. R.S. 08: § 746. C.L. § 4956. CSA: C. 40, § 201. CRS 53: § 118-10-33. C.R.S. 1963: § 118-10-33.

Colo. Rev. Stat. § 38-41-111. When action will not lie against person in possession.

(1) No action shall be commenced or maintained against a person in possession of real property to question or attack the validity of or to set aside, upon any ground or for any reason whatsoever any final decree or final order of any court of record in this state or any instrument of conveyance, deed, certificate of sale, or release executed by any private trustee, successor in trust, public trustee, sheriff, marshal, county treasurer, or any public official whatsoever, whether named in this section or not, or officer or any appointee of any court when such document is the source of or in aid of or in explanation of the title or chain of title or right of the party in possession or any of his predecessors or grantors insofar as the same may affect the title or explain any matter connected with the title in reference to said real property if such document has been recorded and has remained of record in the office of the county clerk and recorder of the county where said real property is situated for a period of seven years. All defects, irregularities, want of service, defective service, lack of jurisdiction, or other grounds of invalidity, nullity, or causes or reasons whereby or wherefore any such document might be set aside or rendered inoperative must be raised in a suit commenced within said seven-year period and not thereafter.

(2) This section shall not apply to any of the following cases:

(a) Forged documents;

(b) During the pendency of an action, commenced prior to the expiration of said seven-year period, to set aside, modify, or annul or otherwise affect such document, and notice of such action has been filed as provided by law;

(c) When such document has been, by proper order or decree of competent court, avoided, annulled, or rendered inoperative;

(d) Where the party, or his predecessor, who brings the action to question, to attack, or to set aside the validity of such documents, has been deprived of possession within two years of the commencement of said action.

Source: L. 27: p. 603, § 39. CSA: C. 40, § 146. L. 45: p. 272, § 1. CRS 53: § 118-7-11. C.R.S. 1963: § 118-7-11. L. 75: (2)(d) amended, p. 225, § 84, effective July 16.